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Supreme Court of the United States

OCTOBER TERM, 1955

No. 257

SOUTHERN PACIFIC COMPANY, PETITIONER,

vs.

CHARLES M. GILEO, EPIMENIO MORENO, ROQUE ARANDA, ALBERT EUFRAZIA AND CHARLES EELK

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR CERTIORARI FILED JULY 22, 1955

CERTIORARI GRANTED OCTOBER 10, 1955

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 257

SOUTHERN PACIFIC COMPANY, PETITIONER,

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CHARLES M. GILEO, EPIMENIO MORENO, ROQUE ARANDA, ALBERT EUFRAZIA AND CHARLES EELK

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

No. 417,036

CHARLES M. GILEO, *Plaintiff*,

vs.

SOUTHERN PACIFIC COMPANY, A CORPORATION, *Defendant*.

COMPLAINT FOR DAMAGES—Filed October 8, 1951

Plaintiff complains of defendant and for cause of action alleges:

I

That at all times herein mentioned defendant was and now is a duly organized and existing corporation doing business in the state of California, and other states and that said defendant was at all times herein mentioned and now is engaged in the business of a common carrier by railroad in interstate commerce in said state of California and other states.

II

That at all times herein mentioned defendant was a common carrier by railroad engaged in interstate commerce and plaintiff was employed by defendant in such interstate commerce, and the accident complained of arose while plaintiff and defendant were engaged in the conduct of interstate commerce.

III

That this action is brought under and by virtue of the [fol. 4] provisions of the Federal Employers' Liability Act, 45 U.S.C.A. 51, et seq.

IV

That on or about the 11th day of July, 1951, at about the hour of 2:00 o'clock P.M. thereof, plaintiff was employed by defendant as a car man working in defendant's

car shop No. 9 in defendant's railroad yards in the city of Sacramento, California.

V

That at said time and place acting in the regular course and scope of his duties, plaintiff was engaged in performing a certain welding work on one of defendant's new gondola cars which was standing in said shop. That for such purpose plaintiff stood inside of the said car. That at said time and place another employee of defendant acting in the course and scope of said employee's duties as an employee of defendant, so carelessly and negligently swung a certain sledge hammer as he stood outside of said gondola car so that the said sledge hammer was caused to strike against plaintiff's head and plaintiff thereby received the injuries hereinafter enumerated.

VI

That by reason of the facts hereinabove set forth, and as a direct and proximate result thereof, plaintiff was rendered sick, sore, lame, disabled and disordered, both internally and externally, and received the following per-
[fol. 5] sonal injuries, to wit, cerebral concussion and contusion, extreme pain and suffering and a severe shock to his nervous system.

VII

That at the time of the happening of the accident, plaintiff was a strong and able bodied man capable of earning and earning the sum of approximately $290 per month; that since the date of said accident and as a result of the injuries sustained, plaintiff has been unable to perform his regular duties except for a portion of the time; that plaintiff will be for an indefinite period of time in the future unable to perform his regular duties, all to his damage in a sum as yet unascertainable, and that when said sum is ascertained, plaintiff will pray leave of court to insert said sum as the reasonable value of said loss of services.

VIII

That by reason of the facts hereinabove set forth and as a direct and proximate result thereof as aforesaid, plaintiff has been generally damaged in the sum of $50,000.

Wherefore, plaintiff prays judgment against defendant in the sum of $50,000, together with such special damages as may be hereafter ascertained, and for his costs of suit incurred herein.

(S.) Hildebrand, Bills & McLeod, Attorneys for Plaintiff.

[fol. 6] *Duly sworn to by Charles C. McLeod. Jurat omitted in printing.*

[fol. 7] [File endorsement omitted]

IN SUPREME COURT OF SAN FRANCISCO COUNTY

ANSWER—Filed December 4, 1951

Comes now, Southern Pacific Company, the defendant above named, and answering the complaint of plaintiff on file herein, shows as follows:

I

Admits as follows:

At all times mentioned in the complaint and herein, defendant Southern Pacific Company was, and now is, a duly organized and existing corporation doing business in the State of California and other states, and was, and now is, as a part of its business, engaged in the business of a common carrier by railroad in interstate and intrastate commerce in the State of California and in other states, and was, and now is, qualified as a self-insurer under the Workmen's Compensation Act of the State of California, and has been issued a certificate under said Act, as in such case is made and duly provided, which certificate is still in full force and effect.

On or about the 11th day of July, 1951, at or about the hour of 1:45 o'clock p.m., thereof, plaintiff was employed by defendant Southern Pacific Company as a carman working in Car Shop No. 9 in the railroad yard in the City of Sacramento, State of California. At said time plaintiff was earning the sum of approximately $290 per month. [fol. 8] At said time and place plaintiff suffered certain injuries.

II

Defendant Southern Pacific Company has no information or belief on the subject sufficient to enable it to answer the allegations of the complaint in respect of plaintiff's conduct, or the nature or extent of his injuries, and upon such ground denies each and every such allegation. Defendant Southern Pacific Company denies each and every allegation of the complaint not hereinabove admitted or denied. Defendant Southern Pacific Company denies the allegations of paragraphs I, II, III, IV, V, VI, VII and VIII of the complaint, save as hereinabove admitted or denied. Defendant Southern Pacific Company denies that plaintiff has been damaged in the sum of $50,000, or any lesser sum, or any sum at all.

And for a Second, Separate and Independent Answer and Defense to the complaint, defendant Southern Pacific Company shows as follows:

I

Defendant here repeats and alleges all the matters set forth in paragraph I of the first answer and defense above, and incorporates them herein by reference the same as though fully set forth at length. If plaintiff were injured in the manner set forth in the complaint, defendant is informed and believes, and upon such ground alleges, that plaintiff was negligent in the premises, and in those matters set forth in the complaint, and negligently conducted him- [fol. 9] self in and about and in respect of said gondola car and said car shop and negligently performed his duties as a carman, with the result that he was injured. Said conduct of plaintiff, as aforesaid, was the sole cause and the sole proximate cause of said accident, injuries and damages, if any, alleged by plaintiff.

And for a Third, Separate and Independent Answer and Defense to the complaint, defendant Southern Pacific Company shows as follows:

I

Defendant here repeats and alleges all the matters set forth in paragraph I of the first answer and defense above, and incorporates them herein by reference the same as though fully set forth at length. If plaintiff were injured in the manner set forth in the complaint, defendant is informed and believes, and upon such ground alleges, that plaintiff was negligent in the premises, and in those matters set forth in the complaint, and negligently conducted himself in and about and in respect of said gondola car and said car shop and negligently performed his duties as a carman, with the result that he was injured. Said conduct of plaintiff, as aforesaid, proximately caused and contributed to said accident, injuries and damages, if any, alleged by plaintiff.

Wherefore, defendant Southern Pacific Company, a corporation, prays that plaintiff take nothing by his complaint on file herein; that it have judgment for its costs of suit incurred herein; and for such other, further and different [fol. 10] relief as, the premises considered, is proper.

(S.) A. B. Dunne, Dunne, Dunne & Phelps, Attorneys for Defendant, Southern Pacific Company.

Duly sworn to by Roy G. Hillebrand jurat omitted in printing.

[fol. 11] In Superior Court of San Francisco County

Notice of Motion for Separate Trial of Issue, Memorandum of Points and Authorities and Order Shortening Time—Filed June 24, 1952

To: Charles M. Gileo and to Hildebrand, Bills & McLeod, his Attorneys:

You Will Please Take Notice that on Friday, June 27, 1952, at the courtroom of the above entitled Court, Law

and Motion Department, at 10 o'clock A.M. or as soon thereafter as counsel may be heard, the defendant will move the Court for an order to try separately the issue raised by paragraphs I, II and III of plaintiff's complaint and paragraph I of defendant's answer, namely whether this Court has jurisdiction of this action purportedly maintained under the Federal Employers' Liability Act, 45 USCA § 51, or whether under the Workmen's Compensation Act of the State of California the Industrial Accident Commission has exclusive jurisdiction of the plaintiff's claim. Such motion will be made upon the ground that such issue raised by said complaint and answer constitutes a bar on ground of abatement to the prosecution thereof and that the issue so raised involves an issue of law, and any such issue is not properly susceptible of trial by jury but is a matter to be determined only by the Court and that the separate trial of such issue will simplify and expediate said cause and constitute a settlement and adjudication of the entire controversy.

[fol. 12] Dated: June 24th, 1952.

(S.) A. B. Dunne, Dunne, Dunne & Phelps, Attorneys for Defendant, Southern Pacific Company.

MEMORANDUM OF POINTS AND AUTHORITIES

The issue raised by the pleadings is whether plaintiff was employed in interstate commerce. It is better to submit questions of this character to the Court in the absence of the jury so as to avoid confusion at the trial.

Ermi v. Penn. R. Co., 36 F Supp. 936;
Agostino v. Penn. R. Co., 50 F Supp. 726.

Under CCP §597, a special issue or defense, not involving the merits of plaintiff's cause of action, but constituting a bar to its prosecution, such as lack of jurisdiction, the Court may, upon motion of either party, proceed to the trial of such special issue prior to the trial of any other issue, which shall await the determination of the special issue.

Steiner v. Thomas, 94 CA2d 655.

This Court has no jurisdiction of plaintiff's claim. A trial of any other issue would be a useless act, wasteful of time and expense of both litigants and this Court.

Respectfully submitted, (S.) A. B. Dunne, Dunne, Dunne & Phelps, Attorneys for Defendant, Southern Pacific Company.

[fol. 13] [File endorsement omitted]

IN SUPERIOR COURT OF SAN FRANCISCO COUNTY
MINUTE BOOK ORDER RETRIAL—June 27, 1952

In this action, respective counsel present and oral representations made to the Court, whereupon the Court made an order that defendant's motion to try separately the issue raised by paragraphs I, II & III of plaintiff's complaint and paragraph I of defendant's answer, said motion having been properly and timely made, be transferred to the Presiding Judge, said motion to be ruled and decided at the time of trial by the trial judge.

[fol. 14] [File endorsement omitted]

IN SUPERIOR COURT OF SAN FRANCISCO COUNTY
CLERK'S MINUTES RETRIAL—July 7, 1952

This cause came on regularly this day for trial, Messrs. Hildebrand, Bills & McLeod by Messrs. Clifton, Hildebrand and Sheridan, Downey appearing as counsel for plaintiff and Messrs. Dunne, Dunne & Phelps by Arthur Dunne, Esq. appearing as counsel for Defendant.

Thereupon by order of Court the Clerk withdrew from the trial jury box slips of papers upon each of which was written the name of one of the following talesmen, each of whom were sworn and examined as to their qualification as follows to-wit:

1. Miss Marion Ross, temporarily passed.
2. Henry N. Hess, temporarily passed.

3. Miss Patricia Gilmartin, temporarily challenged by Plaintiff.
4. Mrs. Florence Pfefferkorn, temporarily passed.
5. Mrs. Jewel E. Cutting, temporarily passed.
6. Mrs. Patricia Conway, temporarily passed.
7. Arthur Cole, temporarily challenged by Defendant.
8. Albert T. Fawcet, temporarily challenged by Plaintiff.
9. Walter R. Rehdish, temporarily challenged.
10. Mrs. LaVada Wenters, temporarily passed.
11. William P. Jones, temporarily passed.
12. John H. Kruse, temporarily passed.

[fol. 15] 13. Joseph D. Lynch, temporarily passed.
14. Mrs. Sarah J. Jones, temporarily challenged by Defendant.
15. Eric Lenhart, temporarily excused for cause.
16. Mrs. Paula M. Van Huningen, temporarily challenged by Defendant.
17. Peter Lowpensky, temporarily challenged by Plaintiff.
18. Miss Mary E. Lennon, temporarily challenged by Plaintiff.
19. Arthur Jones, temporarily passed.
20. Raymond H. Bradley, temporarily challenged by Plaintiff.
21. Guy O. Dowden, temporarily passed.

There being no further challenges or objections the following 12 Talesmen were sworn and impanelled as the jury to try the cause:

1. Miss Marian Ross.
2. Henry N. Hess.
3. Joseph D. Lynch.
4. Mrs. Florence Pfefferkorn.
5. Mrs. Jewel E. Cutting.
6. Mrs. Patricia V. Conway.
7. Arthur Jones.
8. Guy O. Dowden.
9. Walter R. Rehdish.
10. Mrs. La Vada Wenters.
11. William P. Jones.
12. John K. Kruse.

Thereupon respective counsel addressed the Court and jury in opening stafements.

Thereupon Harry J. Hitke was sworn and examined as a witness on behalf of Plaintiff.

Thereupon J. T. Nelson was sworn and examined as a witness on behalf of Plaintiff.

Thereupon Walter N. Miller was sworn and examined as a witness on behalf of Plaintiff.

[fol. 16] Thereupon William E. Black was sworn and examined as a witness on behalf of plaintiff.

Thereupon Raymond McElroy was sworn and examined as a witness on behalf of plaintiff.

Whereupon the Court adminished the jury and ordered the cause continued to Tuesday, the 8th day of July, 1952, at 10:00 o'clock A.M.

[fol. 17] In Superior Court of San Francisco County
Minute Book Order Retrial—July 8, 1952

This cause came on regularly this day for the resumption of trial, the Court, Jury and respective Counsel present.

Thereupon respective counsel stipulated that all the jurors are present and in the jury box.

Thereupon Dr. Gillis Esslinger was sworn and examined as a witness on behalf of plaintiff.

Thereupon Raymond McElroy heretofore sworn was recalled for further examination.

Thereupon Russell Shafter Davis was sworn and examined as a witness on behalf of plaintiff.

Thereupon Earl B. Hunter was sworn and examined as a witness on behalf of plaintiff.

Thereupon Charles M. Gileo was sworn and examined as a witness on behalf of plaintiff,

Thereupon by stipulation of respective counsel the Court discharged the jury.

Thereupon the plaintiff rests.

Thereupon Harry J. Hitke heretofore sworn was recalled as a witness on behalf of defendant.

Thereupon the following exhibits were introduced on behalf of the defendant as follows to-wit: No. A, copy of minutes of S.P., August 17, 1950; No. B, copy of minutes

[fol. 18] of S.P. Equipment Co., Sept. 15, 1950; No. C, Agreement of Sept: 29, 1950; No. D, Agreement July 1st, 1951; No. E, Agreement of July 9th, 1951; No. F, Bill of July 31, 1951; No. G, Bill of Sale; No. H, S.P. Co. Equipment Trust; No. I, Purchase Order; No. J, Purchase Order; No. K, Purchase Order; No. L, Time-Card; No. M. Certificate of Consent to Self Insure; No. N, Order with Pullman Co.

Ordered submitted.

Whereupon the Court ordered judgment for Plaintiff in the sum of $7,000 to draw 6% until paid.

[fol. 19] [File endorsement omitted]

IN SUPERIOR COURT OF SAN FRANCISCO COUNTY

JUDGMENT—July 21, 1952

The above entitled cause came on duly and regularly for trial before the above entitled Court, Department No. 18 thereof, Honorable Clarence W. Morris, a judge of said Court, presiding, the Court sitting with a jury, on Monday, July 7, 1952 on the issues made by plaintiff's complaint and defendant's answer and the cause was thereupon tried and determined. Upon said trial plaintiff appeared in person and by his attorneys Messrs. Hildebrand, Bills and McLeod, Clifton Hildebrand, Esq., and Sheridan Downey, Esq., Jr., and defendant appeared by its attorneys Messrs. Dunne, Dunne & Phelps and Arthur B. Dunne, Esq. A jury was impaneled and sworn to try the cause, opening statements on behalf of the parties were made by their respective counsel, evidence, both oral and documentary, was introduced and the cause was then submitted for decision as herein appears.

By the pleading and during the course of the trial the issues were raised, presented and tried whether the defendant was a common carrier by railroad engaged in interstate commerce and whether the plaintiff was employed by the defendant as such carrier in such commerce, whether any part of the duties of plaintiff was in furtherance of

interstate of foreign commerce or in any way directly or [fol. 20] closely and substantially, affected such commerce, whether the act of the United States of America, in such cases made and provided, and known generally as the Federal Employers' Liability 9ct (45 USC §51 ff), applied, whether the Court had jurisdiction of the cause and whether plaintiff's remedy, if any, was under the appropriate provisions of the Labor Code of the State of California and by application to the Industrial Accident Commission of the State of California. These issues were determined by the Court as matter of law as herein appears.

During the course of the trial, it was stipulated by the parties that the issue of negligence on the part of defendant was conceded and should be resolved in favor of plaintiff, and that if plaintiff were entitled to judgment he was entitled to recover, as to amount, the sum of Seven Thousand Dollars ($7,000.00), that this should bear interest at the rate of 6% per annum from July 8, 1952 should judgment be in plaintiff's favor become final, buf that judgment for plaintiff should be without costs in the trial court. There was no stipulation or agreement that plaintiff was entitled to judgment or that the Court had jurisdiction or that the Federal Employers' Liability Act (45 USC §§ 51 ff) applied or that defendant was an employer or plaintiff was an employee under or within the meaning of the Federal Employers' Liability Act (45 USC § 51) but said issues were presented, tried, argued and submitted and the Court [fol. 21] determined, ruled and ordered, as matter of law, that there was no issue of fact for the jury with respect to these reserved issues, and that resolving all possible conflicts in the evidence in favor of defendant and drawing all possible inferences of fact in favor of defendant, as a matter of law defendant, with respect to its activities herein involved and in manufac*ut*-ing new freight cars, was a common carrier by railroad engaging in interstate commerce and plaintiff was injured while he was employed by defendant and part of his duties as such employee was in furtherance of interstate and foreign commerce and directly or closely and substantially, affected such commerce, that the Court had jurisdiction of the cause, and that the Court would so instruct the jury. Thereupon it was stipulated

by the parties that in the light of and under such ruling of the Court there was no issue of fact to be passed on by the jury, and, by consequence the formality of a verdict was unnecessary, the jury might be dismissed and all the reserved issues having been determined by the Court as matter of law, judgment should pass as ordered by the Court and the Court ordered that plaintiff have judgment.

Wherefore, by reason of the law and the premises it is Ordered, Adjudged and Decreed as Follows:

1. Resolving all conflicts in favor of defendant and drawing all permissible inferences of fact in favor of defendant, as matter of law at the time and on the occasion when plaintiff was injured defendant, with respect to activities on its [fol. 22] part connected with said injury, was a common carrier by railroad engaged in interstate commerce and plaintiff at said time and on said occasion was employed by if and as such employee part of his duties was the furtherance of interstate or foreign commerce and directly or closely and substantially affected such commerce, the Federal Employer's Liability Act (45 USC §§ 51 ff) applied, there is no issue of fact and there is no matter for submission to a jury or for findings of fact and plaintiff is entitled to judgment as herein rendered.

2. Plaintiff do have and recover of and from defendant the sum of Seven Thousand Dollars ($7,000.00) damages, with interest at the rate of 6% per annum from July 8, 1952, without costs in the trial court and that execution, unless stayed, issue accordingly.

Done in open court this 17th day of July, 1952.

(S.) Clarence W. Morris, Judge of the Superior Court.

[fol. 23] [File endorsement omitted]

IN SUPERIOR COURT OF SAN FRANCISCO COUNTY

NOTICE OF ENTRY OF JUDGMENT—July 25, 1952

To the Defendant Above Named and to A. B. Dunne, Dunne, Dunne & Phelps, Its Attorneys:

You, and each of you, will please take notice that on the 21st day of July, 1952, judgment in favor of plaintiff above named and against defendant above named in the sum of Seven Thousand ($7,000.00) Dollars was entered in Docket Book 918 of the above entitled Court, at page 200 thereof.

Dated: July 25, 1952.

(S.) Hildebrand, Bills & McLeod, (S.) Sheridan Downey, Jr., Attorneys for Plaintiff.

[fol. 24] [File endorsement omitted]

IN SUPERIOR COURT OF SAN FRANCISCO COUNTY

NOTICE OF APPEAL—Filed September 2, 1952

Notice Is Hereby Given that Southern Pacific Company, a corporation, defendant in the above entitled action, hereby appeals to the District Court of Appeal, State of California, First Appellate District, from the judgment herein in favor of plaintiff and against said defendant, and from the judgment herein entered in the above entitled action in the above entitled court and made and rendered herein on July 17, 1952, and filed herein and recorded and entered in the above entitled action in the above entitled court in Volume 918 of Judgments at page 203 thereof, in the office of the Clerk of the above entitled court, and from the whole of said judgment and each and every part thereof.

Dated September 2nd, 1952.

(S.) A. B. Dunne, Dunne, Dunne & Phelps, Attorneys for Defendant and Appellant Southern Pacific Company.

[fol. 25] [File endorsement omitted]

IN SUPERIOR COURT OF SAN FRANCISCO COUNTY

NOTICE TO PREPARE REPORTER'S TRANSCRIPT AND CLERK'S TRANSCRIPT, ETC.—Filed September 4, 1952

Southern Pacific Company, a corporation, defendant in the above entitled action, having appealed from the judgment in said action in favor of plaintiff and against defendant and having filed herein its notice of appeal, in the premises, said appeal being to the District Court of Appeal of the State of California, First Appellate District, does hereby, and in connection with said appeal, give notice as follows:

I

To prepare a reporter's transcript of all of the proceedings in the above entitled action, and of all the oral proceedings had in the above entitled action, including all proceedings on the trial thereof including, but not restricted to, testimony and evidence offered and/or received, all in accordance with the Rules on Appeal of the Supreme Court and the District Court of Appeal of the State of California, and particularly Rule 4 of said Rules. All matters specified for inclusion, including all exhibits, shall be fully transcribed and copied, except diagrams, plats and photographs, and including all stipulations of the parties.

II

To prepare a clerk's transcript agreeable to rule 5 of [fol. 26] said Rules on Appeal of the Supreme Court and the District Court of Appeal of the State of California, including therein all papers and records on file and/or lodged with the Clerk, including the Clerk's minutes and any written opinion of the Superior Court and all exhibits either admitted in evidence or rejected all of which shall be transcribed and copied except diagrams, plats and photographs and there shall be included, but this notice is not restricted to, the following:

1. All records, papers and files herein, filed herein or lodged herein;

2. The judgment roll herein including, but not restricted to, the pleadings and judgment;

3. Defendant's notice of appeal and this notice;

4. All exhibits admitted or offered in evidence, all of which shall be copied except diagrams, plats and photographs and it is desired that the originals of all diagrams, plats, and photographs and other exhibits not copied shall be forwarded to the appellate court;

5. The Clerk's minutes insofar as they have not been specified above;

6. All stipulations excepting only stipulations extending time to plead;

7. All orders of the court excepting only orders extending time to plead;

8. All affidavits, excepting only affidavits on proceedings [fol. 27] to take depositions;

9. Notice of entry of judgment.

Dated September 2nd, 1952.

(S.) A. B. Dunne, Dunne, Dunne & Phelps, Attorneys for Defendant Southern Pacific Company.

[fol. 28] Clerk's Certificate to foregoing Transcript omitted in printing.

[fols. 29-31] In the Superior Court of the State of California, in and for the City and County of San Francisco, Department Number Eighteen, Honorable Clarence W. Morris, Judge

No. 411,036

Charles M. Gileo, Plaintiff

vs.

Southern Pacific Company, a Corporation, Defendant

Reporter's Transcript

Appearances:

For the Plaintiff: Hildebrand, Bills & McLeod, by Sheridan Downey, Jr., Esq., Clifton Hildebrand, Esq., 1212 Broadway, Oakland, California.

For the Defendant: A. B. Dunne, Dunne, Dunne & Phelps, by A. B. Dunne, Esq., 333 Montgomery Street, San Francisco 4, California.

[fol. 32] Monday, July 7, 1952—ten o'clock a. m.

This cause coming on regularly for hearing this day, a jury was duly impaneled and sworn.

(The jury was duly admonished and a short recess was had.)

(It was stipulated the jurors were all present)

Mr. Dunne: If your Honor please, we can enter into a running stipulation that that is so, unless somebody notes the absence of the jurors.

Mr. Downey: Yes, certainly.

The Court: All right. Mr. Downey will now make his opening statement, laides and gentlemen.

Opening Statement of Mr. Downey

Mr. Downey: If it please the Court and Mr. Dunne, ladies and gentlemen, the evidence will show Mr. Gileo, the plaintiff, is a man forty years of age, has been with the Southern Pacific since about 1941, and he learned with the company

the trade of welder; and during all those years, he worked in those shops up in Sacramento.

Before that, he did heavy work through the depression, cutting wood and gardening, truck driving, that in general, he was a man doing fairly heavy work; that the welding trade in the shops there involves a good deal of heavy physical exertion, and that he was in reasonably good health. He had had a few accidents before these years with the Southern Pacific Company, hurt his arm once playing baseball—nothing that has much to do with the [fol. 33] injuries in this particular case; that he was a steady worker, and that for some time before this accident—which happened last July 11, 1951, he had been employed up in the Sacramento Yards on a track where they—we might call it an assembly line track—where they make new cars; that they had some new parts and some old parts, and that just like in an automobile factory, the car moves along to one station where they put the wheels on, and the next one where they put the sides on, and the next one, the top, and the next one is where they paint.

And in connection with that, of course, there is a good deal of welding work, and that he had been at that for some period of time. At one time, he ceased operations and went over into the repair shop for repairs; but at least for a good many months before this accident, he had been mostly working on that assembly line track. It is called a "shop," but it is actually outdoors. It is simply one particular track next to the repair track, where they have these cars gradually moving along as they put them together. That when it storms or rains hard, they don't force the men to stand out in the storm all day, and they don't have them sit around all day; they assign them to any necessary repair work or maintenance work that has to be done. That occasionally, when there is a slowup in the line—the crane isn't operating, the parts aren't available or, as with the steel strike, something of that character—the men, welders, are sent over to do a repair job on a car that's just been [fol. 34] withdrawn from service temporarily, perhaps, to have a grabiron put back on, or one thing and another.

That the most part of his work was in the assembling of these cars, and that was his classification at the time of

the accident, as well as for some months before; but that if the boss wanted him to take his welding cord and equipment and go over to the very next track and weld a grabiron back on a car that needed repair, that that's what he did.

Now, on the day in question, he was doing his usual work, and he had some sort of gondola car on which it was his job to weld—I guess the corners together, in some way; he'll describe it to you. And the evidence will show it's kind of a rushed procedure; they have so many minutes to get their part of the work done, then the car is pulled down to the next group of workmen. And, purely through the direction of the company, and not through his own selection in any way, they had two other men working right up close to him, near the corner of this gondola car, one of the fellows standing outside on the track and one of them inside, the Gileo with his welder's hood pulled down and welding away with his equipment, within just a couple of feet of where these fellows were swinging a sledge hammer—it had to do with putting one of the grabirons on the corner of this car.

The evidence will show that Gileo didn't move, he was right at the work, that the other fellows knew he was there, that he had been told to be there, and that one of the other [fol. 35] men who swung the sledge hammer in such fashion that he hit Gileo on the head with it, and that the evidence will show is exactly what happened.

And this knocked Gileo out, and caused him certain damage to the head and to the brain, that he was given medical attention, that he was dazed and stunned for a considerable period of time, that he went on working as best he could for a couple of months after that, and then finally, by September, began to have blackouts and very severe headaches whenever he tried to lean over in his welding work, and was sent down last September to the Southern Pacific Hospital in San Francisco and was treated there for two or three months. In April of this year, he got back to work and has worked part time since then. On one occasion since he went back to work, he again had a blackout and they had to take him home in an ambulance.

We'll call specialists with regard to what his injuries were, exactly; simply, concussion and perhaps a contussion of the brain, which to the present time has persisted in

causing him a good deal of trouble, and in the future, according to the medical evidence, will cause him further trouble.

Now, that, in a nut shell, is the case that we expect to prove; and our claim is based on the ground that whoever was swinging the sledge hammer was careless about it, that if he himself wasn't careless, the company had no business making him work within a couple of feet of where a man had his head exposed. So far as the exact loss of earnings [fol. 36] and the medical testimony, we will leave that up to the evidence as it comes in. There is then the question of whether he was engaged in interstate commerce for an interstate railroad, or furthering interstate commerce by helping Southern Pacific make new cars for their lines; and I'm sure his Honor will instruct you as to the law in that connection.

And if you find that he was so engaged, then was it his own fault or the fault of the company that he got hurt? And if you find that it wasn't his fault, and it was the fault of the other employees, then the question as to how serious his injuries are. And we will forthwith proceed then to present witnesses as to the happening of the accident, and as to his physical condition.

The Court: All right, ladies and gentlemen, Mr. Dunne, representing the Southern Pacific Company, will make an opening statement to you now.

Opening Statement of Mr. Dunne

Mr. Dunne: Ladies and gentlemen, in making this opening statement, I appreciate that I am going to be treading pretty close to dangerous ground and I want you to understand that and appreciate that I know that, and am being careful. The reason I say that is that in every opening statement to a jury, lawyers are not supposed to argue the case; they are supposed only to tell you what they think the evidence in the case will show, and give you an outline of what the disputes may be, so that you know what to watch for, know why certain evidence is being put in, know [fol. 37] where it fits into the case, know what issue is being presented.

Normally, in doing that, the lawyer should not make any

statement to you as to what the law is; the statement of the law to you is the Judge's function. But, in order to point up for you one of the issues in this case, it is necessary for me to make some general statement as to what the law is. That's the reason I say I know that I'm treading pretty close to dangerous ground. However, I am confident that I can do that, and what I have to say in stating the law to you will be accurate, will not go into detail which may be questioned; and the detail, of course, that will be given to you by his Honor in his instructions.

And let me say again, if there is anything that I should say to you as to what any rules of law may be, and in his Honor's instructions, if he should say anything different to you, you of course will disregard anything that I have to say. One of the things that makes this a little bit ticklish, and why I will not be as concrete, perhaps, as I might otherwise be—I think it is fair to make this statement, which is not in the realm of argumnet—that there was an amendment to the Federal Employers' Liability Act in 1939 and the decisions have not yet in all details worked out just exactly what the effect of that amendment is. Of course, that is a legal question we will present to his Honor, and that his Honor will have to rule on.

Now, that is preliminary to saying this to you—I'm sure [fol. 38] I'm on safe ground in making this statement: When men are injured in the State of California, employed in the State of California and work in the State of California and are injured here, they are entitled to claim compensation where their injury arises out of and in the course of their employment, from their employer. No question of any negligence involved. A man is hurt, under our California scheme, he's entitled to compensation and he's entitled to be provided with medical attention. Now, if there is any dispute between the man and his employer, under that California statute, as to how serious his injuries are, what compensation he is entitled to, how long it should be paid to him, whether or not he has received all the medical attention to which he thinks he is entitled, if there are any questions of that sort, we have a special board in California known as the "Industrial Accident Commission" and the workman goes over there and makes his application to that

commission, and that commission then determines what compensation he is to get, what disability rating, if any, he is entitled to, what further medical he is entitled to, if any, and takes care of all the questions which may arise between him and the employer.

Now, there is, however, a statute which you will hear about, known as the "Federal Employers' Liability Act". Now, you will notice from what I am now about to say, I'm being somewhat indefinite; and I'm definitely endeavoring to be indefinite because I want to be careful not to tread [fol. 39] into a field in which I don't belong. I think I can say this fairly, that that statute, by its provisions, applies to certain railroads when they are engaged in certain types of activities, and then it applies to certain, but not all, of the employees of a railroad.

Those two statutes are mutually exclusive; if the state of facts is such that the case falls under the State statute and not under the Federal statute, then, in the event of any dispute, the man's remedy is to go to the Industrial Accident Commission. If, on the other hand, the facts are such as to make the Federal statute apply, then his remedy is here.

Now, the first matter, then, under the instructions his Honor will give you, and under the facts as you will find them, will be this question: Does the Federal Employers' Liability Act apply? Was this railroad, with respect to the work the man was doing, and in respect to his employment, engaged in the kind of activity that brings it under the Federal Act? And was the man, in doing the work he was doing, the type of employee to whom the Federal statute applies? Or, is the Federal statute non-applicable, and isn't this man's proper remedy—as we contend—to apply to the Industrial Accident Commission for an award of compensation, and take his compensation under the State statute?

Now, with respect to that issue, there will be a certain number of matters presented to you, and I will outline them to you generally, to indicate what the type of thing is that [fol. 40] evidence will come in on, that goes to that issue. Generally, Southern Pacific Company, after the war, had started on an extremely large program of acquiring new

equipment; new motive power, new locomotives—steam and diesel locomotives—new freight cars and new passenger cars. The Southern Pacific Company, for a good many years, has had a very large shop at Sacramento; I think it's probably the largest railroad shop west of Chicago. And in that shop, it has equipment for repair, rehabilitation, rebuilding locomotives and freight cars. But it also undertook a program of construction, new construction, there. In the first place, we'll show you that the ordinary operation of the railroad is divided up into departments, and those departments each take up a certain division, or length of the railroad. Those are known as "Divisions" and Sacramento is what is known as the "Sacramento Division". It runs for some purposes from Sacramento to Sparks, Nevada, and for other purposes, from Roseville to Sparks; then from Sacramento on down in this direction is what is known as the "Western Division", and, of course, those Sacramento Yards, for the handling of trains, are connected with the Sacramento Division, operating division.

But, in addition to the operating division at Sacramento are these very large shops, employing from 4,000 to 5,000 men. They can tell you how many men are employed there. They have a number of shops, the boiler shop, where they work on locomotives; there is a wheel foundry; there is a [fol. 41] sawmill in the yard, and two car shops, and a freight car shop. We're not concerned with the passenger car shop. The freight car shop is known as "Car Shop No. 9" and it has its own general car foreman in charge of that shop. I think the evidence will show that there are two general types of work done in that shop. There is some repair work done there—that is, repair work on cars that are already in service, that are brought in for light repair, running repairs, or heavy repairs.

But in addition, along about 1947 or so—at any rate, after the war—when Southern Pacific Company undertook to provide itself with new and additional equipment, it was deemed that at least for part of that program, it would avail itself of the use of its own forces. Now, technically, what it actually did was enter into a contract with the subsidiary, Southern Pacific Equipment Company, for the

building of these cars. Southern Pacific Equipment then went out and acquired the material and Southern Pacific itself supplied the shop facilities at Sacramento and also supplied the labor. That charge was then to Southern Pacific Equipment Company, and they started in a program of the construction of new cars.

I think the evidence will show that a program of car construction was going on in 1950; and then, that particular batch of cars having been completed, there was no new construction for some time. I think my memory is accurate, that on February 12, another program of car construction, either box cars or automobile cars—I think automobile [fol. 42] cars—was started; that that program of automobile cars was terminated in April, and then in April, they started a program of construction of 1,000 new cars that are known as "gondola" cars. They're the cars in which dirt and material of that type can be put, normally don't have any side doors and have no roof. They were constructed, a thousand of those cars, and eventually are going to be leased to the Texas & New Orleans Company, a Texas corporation, T&NO.

In the construction of those new cars, they set up a regular assembly line; this assembly line was not like an automobile assembly line, but they start in on a pair of tracks and start in building the cars by first putting down the wheels, then getting together the trucks that holds the axles and wheels together, then the underframe, then the rest of the car was built on up. And they were set up in stations; a certain piece of work would be done at this station, the trucks assembled and moved to the next station, then the underframe would be applied and moved on to the next station, where certain other equipment—brake equipment, brackets and other things would be applied, and so on down the line, a different piece of work being done in each one of these stations, ultimately leading to the completed car, get down to one end of the line and come back, and eventually pointed, stenciled with the letters "T&NO", the number put on, and then go over to be put eventually into use.

I couldn't give you the total number of stations, but at [fol. 43] about I think the fourth main stop or so, the underframe had been put on the trucks and they were getting

ready to build up the sides. Mr. Gileo was engaged in welding, while other men were engaged in other types of work. Now, the detail of how this was done, I would prefer not to state; there may be some dispute as to exactly what Mr. Gileo was doing from time to time. It is our position, and I think the record will show, that so long as he was assigned to work on new car construction, that is all the work he ever did; he didn't go over and do any other type of work. He stayed right there on the assembly line.

I think the evidence will show if any men were missing from that assembly line, it would simply stop the running of the whole line; and I think the evidence will show counsel from the other side is mistaken, that the assembly line was shut down. I think the United States Weather Report will show this—this accident happened in July—that in July and in June and in May and in April, the spring and summer months at Sacramento, there wasn't any rain to stop the construction of these new cars in the shop.

Now, as to the other aspects of this case: First, does this case belong in this court at all, or should it be in the Industrial Accident Commission? If it is decided it should be over there, then these other questions are beside the point. If, however, it is decided that the case is properly here then you've got some further questions to consider. [fol. 44] In the first place, was this man hurt? The answer is "Yes". We make no question about that. What was he doing when he was hurt? We make no question about that. Counsel stated it to you correctly, he was welding on the end of a car, and just exactly what the detail of that was, he'll have to tell us. I wouldn't want to attempt to describe that, and possibly make some mistake. There were some other men working with him, or near him; not with him in the sense they were doing the same job, but near him. My recollection is that their names were Davis and Bowers, and that those men were working on the application on these cars of what are known as safety appliances, or "grabirons," is what the railroad men call them. You probably call them the ladders that go up the side of the car.

One of these men—I have forgotten which one—was working with a sledge hammer. Now, again, if there is any

question as to precisely what happened, how it happened, we'll let the men themselves tell you about that. But there is no question about this: Mr. Gileo was hit on the head by the sledge hammer which one of them was using. It's my understanding that the man was striking the blow and the sledge hammer glanced, and, not having hit solid, it's glancing pulled it from his hand and it hit Mr. Gileo. But at any rate, the men themselves were there and we will know a great deal more about that than I can tell you; and we'll get it from them, what actually happened. It is my understanding Mr. Gileo was then off for some time; we'll get that from him, then went back to work. It was very shortly [fol. 45] after that that he got into the type of job—another type of work entirely. He had his vacation in July, and we'll get the detail as to what he did at that time. Now, as to what has happened to him since, it is my understanding that the record will show that he is doing entirely different work. On the railroad, men have seniority, and seniority depends upon how long they have worked there; and where there is a choice of jobs, the senior man gets the choice. Or, where there are not enough jobs to go around, the senior man can elect the work; and it is the junior man who is laid off.

So, Mr. Gileo, in the past four years, has been in one job, gone to welding, then he had bid in the machine shop as an inspector, then bid back on again. And it is my information, contrary to the statement that was made, that he had no difficulties of the type of which he is now complaining before this accident, that he had difficulty. He has had headaches and head trouble and eye trouble before this accident, and from time to time, on that account, has bid off the wielding job and has bid into the inspection job in the machine shop. But those are matters which can be told to us by men who were there on the job at the shop, and who will indicate in a general way what his condition is in that respect.

But I do want to say to you that, while I can't tell you in detail precisely what happened, I don't want to make any false issues here, or convey the impression to you that Mr. Gileo was not hurt; I don't want to convey the impression [fol. 46] that he wasn't hit with a sledge hammer, because

that is exactly what happened, and we make no question about it. When the evidence comes in, his Honor will instruct you and a great many of these things will be clear to you.

What I have endeavored now is to say enough to you to indicate where it is that certain of the evidence will apply, and why it is that certain evidence which may appear to you to be highly technical, is being introduced.

(The jury was duly admonished and a recess was had to 2:00 o'clock p. m. of this day.)

[fol. 47] Monday, July 7, 1952—two o'clock p. m.

(It was stipulated the jurors were all present.)

Mr. Downey: I understand Mr. Dunne has produced here the General Foreman, Mr. Hitke.

Mr. Dunne: General Car Foreman of Shop No. 9.

Mr. Downey: We'd like to call him for our first witness.

HARRY J. HITKE, 3144 North 14th Street, North Sacramento, California, a witness called on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct examination.

Mr. Downey:

Q. Mr. Hitke, would you tell us about your work experience and what your job is with the S.P., how long you have been there and so forth?

A. My job is General Car Foreman in the Freight Car Shop in Sacramento General Shops, and I have had that position since September, 1947. I started out to work for the Southern Pacific Company January 2nd, 1925.

Q. Now, have you worked in all the departments in the shops there? Are you familiar with them?

A. I have general supervision over the entire Freight Car Shop.

Q. They do the passenger work separately there?

A. Passenger work is in the Passenger Car Shop, yes.

Q. How many men did you have under your supervision [fol. 48] there in the Freight car Department?

A. At the present time, 620.

Q. Now, tell us the departments that they are divided up into, if you would?

A. Well, we are divided at the present time, into two departments: New Car Construction and Old Repair work.

Q. And how many on the new car construction—how many of your six hundred-odd employees work on the new cars?

A. 270.

The Court:

Q. What do you mean, 270 on which?

A. 270 of the 620.

Q. Work on what?

A. On the new cars.

Q. And the balance?

A. On old car work.

Q. That is, 270 as against how many?

A. 620.

Mr. Downey:

Q. When did you begin the new car work there?

A. July 1st, 1950.

Q. You weren't making the new cars there from—1947, was it?

A. No.

Mr Dunne: That's when the general Southern Pacific program of acquiring new equipment began, about then.

Mr. Downey:

Q. You began some time in 1950, then on this new car construction?

A. July 1st, 1950, on new car construction, yes.

Q. At that time, then, you added a great many employees, if that right?

A. That's correct.

Q. How many did you add right at that time, if you remember?

A. Well, at that time, our force was 745, on that program; [fol. 49] so we added about 400 men—I don't have the exact figures on that, but it would be around 400 men that was added.

Q. They were all new S.P. employees, then?

A. That's right.

Q. Now, explain to us, if you will, how your seniority list works there, and how it applies—if there is any difference—to each of the two departments that you mentioned.

A. The seniority in the freight car shop just applies to the laying off—if we happen to lay off forces, the seniority would govern, as far as laying off forces; and it also governs if, say, a carman was a preferred just, such as welding. He would bid on that welder's job and would be awarded it through his seniority.

Q. Well, what I mean is this: Could a man who has been working in this repair or old car work, if he had the seniority, bid in a job in new car work?

A. Just welders, is all; the rest are all assigned. Maybe I can clarify that. If there was a carman on the old car work bid in on a welder's job, and it was open on a new car line, he could go in on a new car line on that welder's job.

The Court:

Q. When you use the words "bid in," I think you'd better explain what you mean. I don't understand and I am quite sure the jury doesn't. "Seniority", means what?

A. Well, "seniority" is when a man hires and his date that he hires, that is his seniority date.

Q. All right, if a man has been there three years as [fol. 50] against another man's two years, the three-year man has the seniority?

A. That is correct, your Honor.

Q. Now, a man that's been there three years is doing old work?

A. That's right.

Q. And he wants to transfer to the new work, as against a man that's been there two years. Can he have that job?

A. No, not unless we assign it to him. In other words, the employees do not have any right to move from one job to

another, unless the supervision sees fit and assigns the job to him.

Q. That's a matter within the sound discretion of the foreman or superintendent, is that right?

A. That's correct, yes, your Honor.

Q. In other words, a man working three years on old work couldn't walk over to the superintendent and say, "Here, I want to transfer in here with this new work". And, as a result of his request, the superintendent wouldn't say, "Well, all right, then, I've got a man that's only been in two years, so I'll put you in here and take him out"? He couldn't do that, is that right?

A. That isn't the practice, no.

Q. Unless he wants to do it of his own accord? That is, the superintendent?

A. That's correct.

Mr. Downey:

Q. Tell us this, is that the same rule transferring from one job in the repair department to another job in the repair department?

A. That holds true in that, also, where it's assigned by [fol. 51] the supervision.

Q. Is there any difference in seniority lists between the old and the new car men?

A. No.

Q. You work off the same list, is that right?

A. That's correct.

Q. Do you handle that list yourself, Mr. Hitke?

A. I don't handle the seniority list, that's made up in our office in the Sacramento General Shops.

Q. And it is then within your power, for good reason, to transfer men from old car work to new car work, whenever it appears that should be done, is that right?

A. It is within my power to do that, yes.

Q. Just the same as if you transferred them to one position in repair work from another position in repair work; you have the right to send them over to new car work from repair work?

A. No—I have the same power, yes.

Q. And explain to us now the term "bidding in a job"; what does that mean?

A. Well, if we have a vacancy in a welding position, or maybe the passenger car shop has various jobs that they desire to fill, there is a regular bulletin that goes up on the bulletin board, showing all these jobs open for bid. The employees that desire to bid on these positions then——

The Court:

Q. What do you mean by "bid on them"? They don't make any offer of any money or anything?

A. No, it's a regular bid form.

[fol. 52] Q. They make a request?

A. A written request.

Q. That's what you mean by a "bid", isn't it?

A. That's right, a written request.

Q. They'd like to have this particular job and make a written request?

A. That's correct.

Q. And if they have seniority, they are entitled to it, is that right?

A. That's correct.

Mr. Downey:

Q. All right, now, then does a man who happens to be working, say, in the new car work, have the right to bid on a new job that comes up in the old car, or repair work?

A. Only a welder's position, is the only jobs that we would have that a carman could apply for. All the rest of the jobs would be up to the supervision to assign other jobs to them, as they see fit.

Q. What classifications there do you have besides welders? What are the various occupations?

A. Carmen, helpers, apprentices and laborers.

Q. Well, they are all classified as "carmen", are they not?

A. No, they are not all classified as carmen. Right at the present time, we have some 365 carmen, of the total of 620. The rest are made up of carmen helpers, apprentice laborers, painters, painters helpers, and painters apprentices.

Q. Your apprentice period is four years?

A. That's correct.

Q. Then let's take a carman's apprentice. Now, isn't it

the policy of you, as well as the Brotherhoods, to try to switch the men about from place to place as apprentices, so [fol. 53] they can learn all the parts of their jobs?

A. As far as apprentices are concerned, yes.

Q. And you keep a man a month or two on one type of work, then to get him experienced, you endeavor—when it is convenient—to switch him to another department, or type of work? Is that a fair statement?

A. That is in line with the apprentices, as they are learning their trade, yes.

Q. Now, how many shifts do you work this new car department, sir?

A. We have the one main shift; and on a night shift, we only have some 16 men that take care of getting our material into the line for the day shift. So actually, on a new car construction, we're only running the one shift on the building of the cars.

Q. And that's a seven-day job, is it?

A. Five days a week.

The Court: You don't mean seven days a week?

Mr. Downey: That's what I meant.

The Court: Nobody works seven days a week any more, except jurors and lawyers and judges!

Mr. Downey:

Q. They did until very recently, didn't they?

A. It used to be a six-day week; then back in September of '49, they went to five days week.

Q. So it's 8 hours a day for five days a week on that—what do you call it there, the "assembly line"?

A. Assembly line, yes; new car assembly line.

Q. And that consists of one separate track, does it? Or [fol. 54] several tracks on which you do that?

A. On our new car construction line, we have the steel track, the wood track, and then there are two supporting tracks to the steel line, for getting material in location to where we can handle it to the assembly line.

The Court:

Q. Now, the jury doesn't know what you mean by that. What is a "steel track"?

A. Where we do our steel construction of the cars; the building of the steel part of the car.

Q. Is that a separate union?

A. Separate union?

Q. Yes.

A. No, your Honor, the same.

Q. What is the name of the union?

A. AF of L.

Q. What is the classification? Construction men?

A. No, just carmen.

Q. In other words, the carmen, whether they work on wood or steel, all belong to the same organization?

A. That's correct, your Honor.

Mr. Downey:

Q. What do you call this that Gileo was hurt on?

A. That's what we call Track 10.

Q. Track 10?

A. That's right.

Q. And is that a track that has about nine other tracks running just south of it, parallel to it?

A. That's correct.

Q. Then let's put up on the blackboard a line representing Track 10, and that, then, is new cars, is that right?

A. New car construction.

Q. Nothing else goes on there, except new cars?

[fol. 55] Q. Then the next track below is what?

A. No. 9.

Q. And what is that used for?

A. That is used for—the east end of the track is used for our material to support the new car track.

Q. And how far is it separated from the No. 10 track?

A. Possibly 12 feet.

Q. Then we'll draw another line below that, supposed to represent No. 9. And then there are what, eight other tracks?

A. No. 8; they follow right in rotation.

Q. All right, all the way down to 1, does it?

A. No. 1, yes.

Q. And they will all be separated by about 12 feet or so?

A. Approximately the same, yes.

Q. Now, what is No 8 used for?

A. 8 is our switching track, for switching the material into Track 9. Our material is all loaded on shop cars for the easy handling into our assembly line.

Q. What was No. 9, again?

A. Our material track.

Q. Material. And what is 7?

A. 7 is our heavy repair track.

Q. Heavy repairs; and what is 6?

A. 6 is heavy repair.

Q. And what is 5?

A. 5 is heavy repair.

Q. All right; what is 4?

A. 4 is partially heavy repair; and the top portion is for paint, on our present program. However, on one program, No. 4 was used as our new car track.

[fol. 56] Q. And what is 3?

A. No. 3 is our paint track, on both new and old.

Q. What is 2?

A. No. 2 is our new car construction track for the application of all wood par. to the car.

The Court:

Q. Is that pretty much the same as No. 10?

A. That's correct, your Honor.

Mr. Downey:

Q. And No. 1 is what?

A. No. 1 is for both heavy and light repair, the east end; the west end is for the handling of material into our new car track.

Q. All right, now, tell us, if you will, when if ever during your regular work days, does the work on the new car track stop—No. 10 track, the assembly line?

A. It doesn't stop, other than if we would happen to run out of material.

Q. What about weather conditions, would they have any bearing on it?

A. The weather conditions haven't hurt us too much. There's only been——

The Court: Never mind, what do you do if the weather does hurt you?

A. The men work right out in the rain. To date, we have only closed a part of two days, due to the weather conditions. That is when we had some heavy storms, and a good part of the men went home, and that closed our line down. Other than that; we work right on through all weather, no matter how bad the condition is.

Mr. Downey:

Q. You mean in the two years that you have been operating there, you have only shut down on two days?

[fol. 57] A. On account of the weather conditions, yes.

Q. High winds, you don't stop?

A. That was one of the bad days we shut down; it was only for part of the day.

Q. You went through last winter? I guess you had pretty heavy rains in Sacramento. The track kept operating right through all day?

A. That's right, with the exception of last winter, one day, that we had to take—most of the men went home, so the rest of the crew, we had to assign them to another job for the remainder of that day. And the next morning, we went right back on the new cars again.

Q. Now, on this material shortage—I forget just how you phrase it—tell us about that. Where you might stop on account of material, did you say——

A. We started on the new car construction on July 1st, 1950, and we continued on up until January 8th, 1951, when we run out of new car material; and we was closed down on the new car track until February 12, 1951, when we resumed construction of new cars again.

Q. Did you lay off all your men—the new car men—during that time?

A. During that time, we assigned them to other work, in order to keep the forces; to keep from laying them off. We brought in extra work of other repairs, in order to maintain that force.

Q. How many cars do you make there a day, on the average?

A. At the present time, we're running ten cars a day.

At the peak of our production, at one time, we run eighteen [fol. 58] cars per day.

Q. This accident was just about a year ago, I believe, in July of '51; what were you running then?

A. Eighteen cars per day.

Q. And what moves the cars along this track in the assembly line, what keeps them moving?

A. We have what we call a car-moving winch, it's operated by air and it has a cable drum, where a half-inch cable rolls up on the drum and pulls the cars along the track.

Q. When they start on that track, they're already set on their wheels, are they?

A. No. We assemble the trucks—that is, the wheels and the frame and everything that goes to make up the car trucks—we assemble that right on the head end of our construction line. That moves down into our first position, to where we put the underframe on those trucks, in the upside down position. It moves along the line to where we put various parts on the under frame, while it's upside down; then, in the fifth position, it is rolled over in its right position and is placed on the trucks. And from there on, it goes in its right position throughout the line.

Q. You have a really heavy crane there to do the work?

A. A regular crane, with 5-ton air hoists, that pick up that underframe and turn it over.

Q. Does that ever get out of order and stop the work? The crane, I mean?

A. They break down from time to time, for possibly a half hour, or maybe three-quarters of an hour. We change [fol. 59] and put another hoist in its place and resume the work of the line.

Q. During those interruption periods, do you have the right and do you assign any men who may have been left idle, to any other tasks on the nearby tracks?

A. No, we do not, because those men are working pretty hard on that construction line, and if there is a lapse there of fifteen or twenty minutes or half an hour, those men are not moved from that line to another job, because when that line starts up again, they make up whatever they lose in production. Say, for instance, we lost one

car due to a hoist breaking down. They would make that car up in a matter of the next day or possibly two days, by working just a little bit harder on the line.

Q. Now, are all classes of freight cars assembled on that line, on that track?

A. To date, we have assembled automobile cars, box cars and gondola cars, the three classes of cars.

Q. And you use the same number of employees, whatever class of car it happens to be; is that right?

A. No, the class of car would govern the amount of employees that we would work on the line.

Q. Tell us about that; what do you mean?

A. In our automobile car program, we had 425 working on that program, against 270 for this program, for the same amount of cars, ten cars per day.

[fol 60] Q. What kind are you building now?

A. Box cars, the 40-foot box car.

Q. And you don't have as many men for that?

A. No, because the car is much smaller than the automobile car that we had the 425 men on.

Q. And what about your gondola cars?

A. The gondola car is a much smaller car.

Q. About the same force as for box cars?

A. About the same force as for box cars and gondola cars.

Q. What do you do, then, just for maybe one month or a year, work only on one type of car?

A. We had 1500 automobile cars; after that job was completed, we built 1000 gondola cars, then 500 box cars, then 500 more gondola cars, then 400 all-steel gondola cars; and we are now working on a 1500 box car order. We had 1200 of that order released to date.

Q. When you finished your 1500 automobile cars, did you lay off the extra men that you didn't need on the box cars?

A. The men that we did not need on the gondolas were assigned to other jobs.

Q. But they kept on working, then, in repair work?

A. That's right, they were assigned to other work.

Q. Then, when you began the gondolas, there was some change, but not much?

A. There wasn't too much change; it was only a matter of a day elapsed between the two programs.

Q. Well, what I meant was, do you use exactly the same [fol. 61] number on gondolas as you do on box car construction?

A. No, not the exact number.

Q. Well, the same applied, then, when you laid off some of the men when you started making the gondolas; those men went over to repair work temporarily, until you got back to boxes, is that right?

A. The men we did not need on gondolas were assigned to old work, yes.

Q. Now, you pay these men, I assume, by some sort of time slip that they check in and check out through the machine?

A. They have a regular daily time card that they pick up in the morning at the time clock and punch in; then this card is filled out by them during the day, or before the close of the shift, and is turned in to their foreman.

Q. Now, does that card show exactly where they work?

A. It has a shop order number. On all new car construction, each program is assigned a different shop order number, and the men working on that program charge their time against that shop order number.

Q. Now, suppose this: Suppose that during the day, in any one of the departments that you handle there, that a man for an hour or two is assigned over to help out on some emergency or special work, away from his regular shop. Would that show on the time card?

A. That happens in cases from the old work to the new car line, due to absenteeism on the new line. We have to fill that in daily, and those men are charged to that shop order when they are assigned to that new car line [fol. 62] for that one day or two days, or whatever it may happen to be.

Q. That is, you have the right, in case you happen to get some absentees in one of your repair shops, if you have got some men to spare some place else, to transfer them over to the new shop for a day or two, whatever is necessary? Is that right?

A. Just due to absenteeism, or if the men working on the new car line are on vacation. We have to fill every

one of those vacancies on the new car line, because our new car construction program is our No. 1 program in the shop.

Q. Well, you have some latitude out of these 270 employees, do you not? You have actually more than exactly 270, if that is the required number on the car you're constructing?

A. The 270 men are the actual men it takes to run the line.

Q. Well, out of that many men, I assume you'd average for one reason or another, several absentees each day, would you not?

A. Yes, it runs close to about 10 per cent absenteeism.

Q. And then on any given day, you would average a transfer of about 10 per cent of 270, or say 27 men, over to the new car line to keep it going?

A. That's correct.

Q. And what procedure do you have to follow to do that? Do you yourself look over the charts and see where the men are most needed, or do you leave that up to your assistant foreman?

A. We have our heavy repair program that we draw [fol. 63] all men from that program to keep the new cars going; and my foreman takes care of that first thing in the morning.

Q. You have a special man that follows that?

A. He goes down to the new car line and finds how many men each supervisor on the new car line requires, and he draws that amount of men from the old car program, to fill in the new car line.

Q. Now, let me ask you this: You know Mr. Gileo, I assume; he's a welder there, is he not? Or was?

A. That's right.

Q. And he's car inspecting recently?

A. That's correct.

Q. Well, assume that he was working as a welder, as he was at the time he was hurt, and that the job of welding opened up in the repair department. Now, would he have the right to bid that in?

A. No, it would be just through an assignment of the supervision force of the shop, as to whether he would be taken from the new line and assigned to any other job.

Q. Would it be up to you, then, to determine whether he could take it?

A. Yes, that would come to me from my assistants; it usually is handled through them, and they in turn take everything up with me, before they make that decision.

Q. But there'd be nothing in the rules or system that you follow to prevent that transfer, if you thought it advisable, is that correct?

A. That's correct.

[fol. 64] Q. And it would be the same procedure if he happened to be working on repair work, as a welder, then for some reason wanted to go over to the new car construction; you'd follow the same procedure?

A. Follow the same procedure.

Q. How many welders were you working on this new car construction?

A. I don't have the exact figure, but it's in the neighborhood of about eighteen.

Q. About eighteen?

A. About eighteen welders. I don't have the exact figure.

Q. That would be out of the approximately 270 total employees?

A. That's correct.

Q. Now, do you commonly need welding work done over here on your heavy repair track or your running repair track?

A. Yes, there are welders on all of our repair tracks.

Q. I mean, are they assigned there every day, to work there 8 hours a day?

A. That's correct.

Q. How many on each track?

A. I don't have that figure. We have some—about 36 welders in our departments, and we have welders on all of our various work.

Q. You mean 36 in addition to the 18?

A. No, that's the total.

Q. Total?

A. Yes.

Q. Now, do I assume correctly that on your heavy repair track—also, of course, your light repairs—the amount of work done each day and the type of work varies, according

[fol. 65] to whatever may be wrecked, or out of condition? Is that right?

A. That's correct.

Q. And one day, you might need several welders on one track and the next day, you might need none, is that right?

A. It changes.

Q. Now, assume a work stoppage on your assembly track, for any reason—just assume that does occur—do you or the foreman have the right then to have one of your welders on the new car track came down to help out while they have the time?

A. No, not unless the whole job would stop for a period of time, like it did on the 8th of January, 1951. If a whole program would stop, due to a material shortage, then the whole gang as a unit would be transferred to another job. But due to just a short holdup on the new car line for any reason, those men are not used on any other work.

Q. Do you have one particular man in charge of the new car work?

A. I have an Assistant General Foreman.

Q. What is his name?

A. Darrell Firth.

Q. And he actually supervises all the work on that track?

A. That's correct.

Q. Do you yourself go down there to do any personal supervision?

A. Occasionally, I make my rounds up and down the track, but with all the other work, I do not have the time to stand on that track constantly, all day long.

Q. Now, the welders on that track, tell us generally what [fol. 66] their duties are. Do they weld the sides together, and so forth?

A. Well, their duties cover a lot of different phases of work. For instance, in the assembly of our trucks, there is one welder in that location that welds on the friction plates to the truck sides. Then, in the next position, there are welders that weld the brake brackets to the underframe of the car. Then, there are welders that weld—spot weld the sides on the car, and they weld on the ends of the cars, and on the gondola program, the welders spotted all of the

ladder brackets to the cars. So, it covers a lot of different phases of work throughout the program.

Q. Is it a job that demands more skill and experience as a welder on the new track than on repair work?

A. No, because all welders have to pass a welding test.

Q. Well, I mean, do your apprentice welders work on the assembly track?

A. We do not have any apprentice welders.

Q. How do they get to be welders, then?

A. Well, some of the boys go to night school; others practice from time to time, as they can, until they are able to pass their welding test, and bid on a job, or make application for a welding job.

Q. You have some sort of examination you give them, before you put them on as a welder, of course?

A. That's right, they have the welding foreman in the locomotive shop, he makes all the welding tests.

[fol. 67] Q. Now, you have Gileo at the present time inspecting equipment, is that right?

A. It's out of my jurisdiction, down in the locomotive shop.

Q. Now tell us this, if you know: What about your old wheels and axles that are parts of cars that are junked? Do you re-use many of them in these new cars you're making?

A. All the wheels going into the new cars are new cast iron wheels, made in our foundries in Sacramento General Shops. Those wheels are sold by the Southern Pacific to the Southern Pacific Equipment Company. The Southern Pacific Equipment Company buys all of its own material for the building of these new cars. There are a number of second-hand axles that do go into the building of the new cars; those, again, are purchased by the Southern Pacific Equipment Company from the Southern Pacific Company, or from other various steel companies, and they're put in the new car program.

Q. Wait a minute, you say the Southern Pacific Equipment Company purchases the old axles from the Southern Pacific Company?

A. That's right.

Q. Then sells them back to the Southern Pacific Company?

A. The Southern Pacific Company does not build the new cars; the cars are built by the Southern Pacific Equipment Company.

Q. Who pays the men who do this work?

A. The Southern Pacific Equipment Company turns over the money to the Southern Pacific Company for the building of the new cars. In other words, our men charge [fol. 68] the shop order every day, and when that goes into the accounting office, the Southern Pacific Equipment Company reimburses the Southern Pacific Company for the amount of money that has been paid to those men.

Q. But it is the railroad that actually pays the men, is it not?

A. To begin with, yes; and then the Southern Pacific Equipment Company reimburses them for that money.

Q. Are the men on that track listed as Southern Pacific Railroad employees?

A. That's correct, that's correct.

Q. Then, aside from old axles, are there any other old or reconditioned parts that are used on the new cars?

A. In some of the programs, yes. On the gondola program, we put on some 100 car sets of A.B. brakes, second hand, and some of these came from El Paso, and were purchased by the Southern Pacific Equipment Company from the Southern Pacific at El Paso.

Q. And that's about the extent of the old parts that are used?

A. In our first program, on automobile cars, there were journal bearing wedges—they were all second hand. Some of those were purchased from the Southern Pacific Company, that had come off of old equipment; some of them were purchased from steel companies in the East and shipped out, second hand, due to being unable to obtain new ones.

Mr. Downey: Mr. Dunne, I assume it will be stipulated that these three classes of cars that they make are used just like any other Southern Pacific freight cars, indis- [fol. 69] criminately in state and interstate commerce?

Mr. Dunne: Yes, the cars when completed were turned over to the purchaser—I use that term carefully, because of the steps taken under the equipment trusts; and then

eventually, if they were assigned to Southern Pacific Company, went into general service of the Southern Pacific Company. Or, if they were assigned to the T&NO, went into general service with the T&NO.

Mr. Downey: And the "T&NO," is a subsidiary of the Southern Pacific?

Mr. Dunne: That's right.

Mr. Downey: We'll accept that stipulation. I believe we have no further questions.

Mr. Hildebrand: We had this understanding: These witnesses are here from out of town, and we don't want to disrupt the car departments up there any more than we have to, by having too many people here; and Mr. Dunne was kind enough to agree we might withdraw this witness and put these other boys on.

Mr. Dunne: I will have some other matters from Mr. Hitke, but I have no objection to doing that. Mr. Hildebrand asked me if we would bring down Mr. Burke and Mr. Firth, who are the two Assistant General Foremen; I said we would, if he wants them, have them down here. But I would like to arrange it so that all three of the top supervisory men in the car shop No. 9 are not absent at [fol. 70] the same time, so we may have to stagger them a little.

The Court: Well, whatever you gentlemen agree on is entirely agreeable to me. You don't want to interrogate this witness?

Mr. Dunne: No, they can withdraw him now and I will examine him later, if your Honor please.

J. T. Nelson, 6128 Camelia Lane, Sacramento, California, a witness called on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct examination.

Mr. Downey:

Q. Mr. Nelson, you work for the Southern Pacific up at Sacramento is that right?

A. Yes, sir.

Q. What is your job with the company?
A. I am an apprentice, upgraded apprentice.
Q. What is that?

The Court:

Q. What is an "upgraded apprentice"?
A. That is an apprentice who is doing carmen's work, and getting carmen's pay.
Q. How long have you got to serve before you get to be a journeyman?
A. Four years.
Q. How long have you served?
A. I don't know exactly, but I think it's got about 3½ years.
Q. You've got about another half year to go before you're a journeyman?
A. Something like that.
Q. And in the interim, they have raised you up and [fol. 71] you're getting a journeymen's pay?
A. That's right.

Mr. Downey:

Q. Now, when did you begin working for the Southern Pacific?
A. July 1st, 1948, as a helper.
Q. And you work under Mr. Hitke, the General Foreman, who was just here?
A. Yes.
Q. Have you had occasion to work over on Track No. 10, where they assemble or make new cars?
A. Yes, sir.
Q. How much time have you put in on that track, Mr. Nelson?
A. Oh, possibly from a year and a half, maybe two years.
Q. And tell the jury now, during that period of time when you were assigned to that new track, whether there were occasions when you temporarily interrupted your work to go over into repairs of any kind?

Mr. Dunne: That's objected to as incompetent, irrelevant and immaterial; it's too remote, it's too indefinite as to time, as to character or occasion. Certainly I have

no objection to the general practice, but this case can't be dealt with as to one man, by showing what some other particular man did or didn't do.

Mr. Downey: All right, I'll withdraw the question.

Q. Mr. Nelson, let me ask you this: As to the general custom and practice up there on that assembly line, as you observed it in your months or years of working there, state what was the practice with reference to temporary transfer to and from repair, to new car work, when you worked there.

Mr. Dunne: That's objected to as incompetent, irrelevant [fol. 72] and immaterial, and too remote. We're not concerned in the case of Mr. Gileo with what happened two or three years before; we are concerned with what the situation was at the time he was hurt.

The Court: I think that's correct; I'll sustain the objection. I think you'd better make your question a little bit more particular as to time, here.

Mr. Downey:

Q. Mr. Nelson, do you recall an accident to Mr. Gileo on the new car track in July of 1951?

A. Yes, sir.

Q. Where were you working then?

A. I was working—putting roofs on the new cars, with three other fellows.

Q. Let's refer, then, to that period of time around July, 1959——

The Court: Not '59; this is only '52, now.

Mr. Downey:

Q. In July of 1951, what was the general practice at that time with reference to whether men were or were not transferred temporarily back and forth between new and old car work?

Mr. Dunne: That's objected to as incompetent and irrelevant, as without foundation, and too indefinite.

The Court: Let him answer the question.

The Witness: Well, the way I found it at that time, and

all the other times that I've been working on that line, it has been a very common occurrence——

[fol. 73] Mr. Dunne: I move to strike that out, about the other times.

The Witness: —for people and the men to be——

The Court: Wait just a moment. Now, we're speaking of that particular time, not other times.

(The last question was read by the Reporter.)

The Court:

Q. July of 1951, were men transferred back and forth from new to old work?

A. Well, I can't—as far as that goes, I can't remember any definite case of it, but it has been done; it happens every day.

Q. All right, then, that's your answer; "Yes, it happens every day," is that right?

A. Yes.

Q. How old are you?

A. Twenty-two.

Mr. Downey: I think that's all, Mr. Nelson.

Cross-examination.

Mr. Dunne:

Q. Mr. Nelson, in July of 1951, what was the character of the work that you were doing? Now, that's the month when Mr. Gileo was hurt.

A. I was applying roofs to some—I believe it was box cars, I don't remember.

Q. Just what work were you doing in applying roofs?

A. Well, we were putting roofs on.

Q. No, you, personally.

A. Personally, I was putting the roofs on.

Q. In what way? What part did you have with applying roof?

A. There's four men works up there in a crew, they all [fol. 74] work together. I don't put those on by myself, I have help.

The Court:

Q. Do you build the roof, then put it on, down below? Or do you build the roof right on the car?

A. No, they come in on Track 9, on flat cars. At that time, I believe there——

Q. What comes in, the roof?

A. The roofs, over the flat car.

Q. The roof is already assembled, is that right?

A. Yes, sir.

Q. And it comes in on a flat car?

A. Yes, sir.

Q. And what do you fellows do?

A. Then we have an overhead crane—two of them—that will swing out and hook onto the roofs and lift them up, bring them back over and set them on the box cars, and bolt them down.

Q. Then you fellows go to work and bolt the roof down to the flat car itself?

A. No, no, the box cars. And ream them, and pin them down, and that's all.

Mr. Dunne:

Q. What I want to know is what part of that general process you personally were taking part in, as a matter of picking up the roof, a matter of putting over in place above the sides, a matter of letting it down, a matter of reaming the holes, and then were those bolted or riveted?

A. I did it all.

Q. That's what I want to know. Your crew of four men took part in all that?

A. Yes.

Q. Including the riveting?

A. No.

[fol. 75] Q. Then there was a separate gang that did the riveting, is that right?

A. That's right.

Q. I don't want to take unfair advantage of you, but as a matter of fact, in July of 1951, they weren't putting any roofs on cars, were they? They were building "gons"?

A. When Gileo got hurt, I believe I was up there—I think they were—I know they was.

Q. They were building "gons" at that time, weren't they?

The Court: Well, the witness said when Gileo was hurt, that's what they were doing, "I know that I was doing that."

Mr. Dunne:

Q. You were putting roofs on cars at that time?

The Court: A young man like you ought to remember one year ago.

The Witness: I believe I was.

Mr. Dunne:

Q. Don't you know they started in building a thousand "gons," T&NO "gons," in April of 1951, and continued that program for several months until they had built over a thousand of them?

A. Well, I might be mistaken, but I think that's what it was.

The Court:

Q. What do you mean, you might be mistaken, but you think that's what it was? You mean, you might be mistaken, but you think that——

A. Well——

Q. —wait a minute—you think in July of '51, you were putting roofs on box cars? Is that what you mean?

[fol. 76] A. Yes, sir.

Q. But you might be mistaken, is that correct?

A. Well——

Q. You wouldn't have any reason here for telling us anything but the truth?

A. No, sir, I wouldn't.

Q. You're not interested in Mr. Gileo, are you?

A. No.

Q. You don't want to help him, do you, anything of that kind?

A. No.

Q. You want to tell exactly what the truth is?

A. That's right.

Q. And I believe you do, frankly; I'm not worried about it at all. Now, this is in July, '51—just a year ago—now, is it your best recollection that at that time, you and these other three boys, or men, you were working with, were actually engaged in putting roofs on box cars?

A. Yes, sir; I think so, yes.

Q. All right, if that's your best thought.

Mr. Dunne:

Q. Do you know the difference between a box car and an automobile car?

A. Yes, sir.

Q. What is your recollection, whether they were box cars or automobile cars?

A. Look, I worked there for a long time—I worked in that same position a long time—and I don't remember which months those cars ran through there. I put roofs on the box cars and the automobile cars and every other kind of a car that went through that had to have roofs, and I don't remember what month it was. To my recollection, I think it was box cars.

[fol. 77] Q. Every car that went through didn't have to have a roof, because "gons" don't have roofs?

A. That's right.

Q. So none of the "gons" had roofs on them, did they?

A. No.

Q. Were you around there when they were building gondola cars?

A. Yes, sir.

Q. Did you work on the gondola cars?

A. Yes, sir.

Q. What was your job in the construction of gondola cars, new gondola cars?

A. I did several jobs.

Q. Which ones did you do?

A. I welded on some, I riveted on them.

Q. What part did you play in the riveting?

A. Well, I drove them, I bucked——

The Court:

Q. Wait a minute, you drilled them?

Mr. Dunne: No; he said "drove."

The Court:

Q. You mean you used a power drill?

A. No, a driver, for riveting.

Q. You were running them dry? When you say you "bucked" them, you held on? Or did you really drive the rivets?

A. I did both. I drove the rivets and I bucked them.

Q. Both.

A. And I heated them.

Mr. Dunne:

Q. And you caught them?

A. Catch them, too, sometimes.

Q. Now, these ladies and gentlemen don't understand about riveting on cars. In the first place, when you're riveting on cars, you have a man who heats the rivets in the furnace?

[fol. 78] A. Yes, sir.

Q. Then when the rivets are *hot*, he picks them up in tongs and throws them to where they are needed?

A. That's right.

Q. And there's a man there with a bucket who catches them, and he also has a pair of tongs, is that right?

A. Yes, sir.

Q. And he picks up the hot rivets out of the bucket with the tongs and places them in the *w*holes where they are wanted?

A. Right.

Q. Then you got two other men, one man who holds the back of it, the head of it, that's already on there, in place, that's called "bucking" it?

A. Yes.

Q. Then there's another man with a riveting gun, and he's on the other end of that rivet and shapes the head on the other end, is that right?

A. Yes, sir.

Q. Always four men on a riveting crew, aren't there? Or were, up there?

A. Yes, sir.

Q. On that line?. What happened if a man was absent from that riveting crew of four?

A. They would replace him.

Q. Where did they get him?

A. Anywhere he was available to get, off repairs, off other parts of the new work.

Q. In other words, whenever there was an absentee there on the new line, it was filled up, is that right?

A. Yes, sir.

Q. And isn't that the occasion when men were taken from [fol. 79] the other work and brought over to the new line?

A. Most of the time?

Q. Yes.

A. But then, again, say that now—take myself, for instance, when I heard a while back they wanted welders. There was no welding jobs up and I claimrated; they made me a welder, in other words, and I got welder's pay for it. But I didn't bid on the job, in other words, I was just claimrated. I was welding on the new work. From the new work, I might weld there a couple of weeks, when I went to repairs.

Q. You were assigned to the repairs?

A. I might have welded there a couple of days and come back on the new work.

Q. Never mind what you might have done; give us your best recollection of what you actually did.

The Court: Well, I think his answer is somewhat off now; this, as I understand it, is just lately.

Q. Is that right?

A. It was possibly five or six months ago.

The Court: That's what I thought.

Q. But now, in 1951 is what we're talking about, when Mr. Gileo was hurt; at that time, were you doing welding for a couple of days, then back on repair work, and then came back?

A. No, sir.

Q. All right, try and confine yourself to 1951, in July; that's what we're interested in.

A. Yes, sir.

All right, I think maybe we might take a recess now, if you have no objection.

(The jury was duly admonished and a short recess was had.)

[fol. 80] After the Recess

The Court: All right, Mr. Nelson, take that far seat.

Mr. Dunne:

Q. Mr. Nelson, do you remember when they were making automobile cars?

A. No, sir, I don't, not the exact month.

Q. Do you remember doing any work welding on loaders on automobile cars?

A. Yes, sir.

Q. Now, isn't this what happened: When you went to work in the automobile cars, you were working with a crew of four men putting the roofs on?

A. Yes, sir.

Q. When you were doing that, that was all the work you did at that time, wasn't it?

A. Yes, sir.

Q. Then at a later time there was a chance to do some welding on the loaders on some automobile cars and you went over and did some of that, didn't you?

A. Yes, sir.

Q. That was only for a few days, wasn't it?

A. I think it possibly might have been a month, month and a half.

Q. Don't you remember after you had been over there a comparatively short time you found it difficult to work welding underneath the cars down below and you asked to go back as a car man?

A. Are you talking about the loaders in those—no, sir, I don't.

Q. You don't remember that?

A. No. The time when I was working on the loaders [fol. 81] there was a fellow that had a little more seniority then I did and he bumped me off that time.

Q. When you were doing that welding, though, that was welding on the loaders on the automobile cars, wasn't it?

A. Yes, sir.

Q. When you were doing that kind of welding, that was all the work you did, wasn't it?

A. Yes, sir.

Q. And then after you were off that job, then you went back doing some other work on the new car line, wasn't it, isn't that right?

A. Yes, sir.

Q. Do you remember what that was?

A. Back on the roofs, I believe.

Q. Then you were back there with a regular crew of four, weren't you?

A. Yes, sir.

Q. And you four fellows, that's all you did, was work on those roofs?

A. Yes, sir.

Q. As a matter of fact, do you remember now when you were doing that kind of work about how much time you had on your station to get your work done?

A. Possibly about ten minutes to a car.

Q. Wasn't it more like about twenty minutes between each move?

A. Something like that.

Q. You had a certain amount of work to do during that time?

A. Yes, sir.

Q. If you didn't have four men there, you wouldn't get it done in that time, would you?

A. Not very well.

[fol. 82] Q. If a man was missing from that work, sick or taken off, that would hold up the whole line, wouldn't it?

A. Until they got someone to take his place.

Q. That's right. So when you were doing that kind of work, they tried to fill in a man on that crew of four just as soon as they could, wouldn't they?

A. Yes, sir.

Q. After you got through with the work on the roofs, do you remember what the next job was?

A. Not right offhand, I don't know.

Q. As a matter of fact, the line was shut down about a month, wasn't it, the early part of '51?

A. It was shut down along there someplace, but I don't remember the date.

Q. From about January 8 to a little short of the middle of February; do you remember that?

A. Yes, sir, I do.

Q. During that period you were sent off to do some other work, weren't you?

The Court: Were you ever laid off from work for a month?

The Witness: Yes, sir—no.

The Court: Were you?

The Witness: Well, not from the S.P.

The Court: That is what I am talking about, from the S.P., working for the S.P. You were working for the S.P., weren't you?

[fol. 83] The Witness: Yes, sir.

The Court:

Q. Were you laid off for a month?

A. No.

Q. What were you doing when you weren't working on this line?

A. That is what I was trying to remember, the exact job. I don't remember.

Q. Did you go in the machine shop, the blacksmith shop?

A. No, the car shop 9, the same place.

Q. The same work?

A. No, repairs.

Q. The car-shop line?

Mr. Dunne: Car shop 9, the number of it.

The Witness: Went on repairs.

Mr. Dunne:

Q. You went on repairs during that time?

A. Yes, sir.

Q. Do you remember they started up the line again and made some more automobile cars?

A. Yes, sir.

Q. Did you go back on roofs then?

A. Yes.

Q. When you were back on roofs again, that was the only work you did, wasn't it?

A. Yes, sir.

Q. Now, do you remember when they got through with that 500 automobile cars and started in making some gonds?

A. Yes, sir.

Q. Did you go to work on the gonds then?

A. Yes, sir.

Q. When you were working on the gonds, that was all the [fol. 84] work you did was there on those gonds, wasn't it?

A. Yes.

The Court: You ladies and gentlemen understand when he says "gonds" he means gondolas. You understand that that is an abbreviation. That is a car without a roof and it folds up in the middle and empties its load out on the side.

Mr. Dunne: There are various types, open bottom and solid gonds, but a gond is a car that has some kind of a floor, two ends, two sides, and no roof.

Q. Isn't that right?

A. That's right.

Q. And then when you would be working on the new car line, if you were assigned to do work on the new car line you would do a full eight hours work there each day?

A. Yes, sir.

Mr. Dunne: I have no further questions.

Mr. Downey: You may step down.

The Court: All right, you may step down, Mr. Nelson.

(Witness excused.)

The Court: Are we through with Mr. Nelson, gentlemen?

Mr. Dunne: Yes, your Honor.

Mr. Downey: Yes, sir.

The Court: He may be excused, no need to return?

Mr. Downey: Correct.

Mr. Dunne: So stipulated.

The Court: Mr. Nelson, you may go back to Sacramento as soon as you like. You won't have to return here. You [fol. 85] will be excused.

Now, what about Mr. Hitke, do you want him here?

Mr. Dunne: Yes.

The Court: All right, Mr. Hitke; you will stay here until the Court releases you from any further attendance. But Mr. Nelson may go back to Sacramento.

Mr. Downey: Mr. Miller.

WALTER N. MILLER, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk:

Q. Will you state your full name, please?
A. Walter N. Miller.
Q. Where do you live, Mr. Miller?
A. 5624 Brad Way, Sacramento.

Direct examination.

Mr. Downey:

Q. Mr. Miller, what is your job with the S. P.?
A. I *have* a freight car man welder.
Q. How long have you worked for them?
A. I have been back there now since April 19, 1949.

The Court:

Q. Had you been there before?
A. Yes, sir, I have been there twice before.
Q. When did you first go to work for the S. P.?
A. October, 1945.
Q. As a welder?
A. As a freight car man.
Q. Start from there and tell us what you did, how long you stayed there, and then how long you were gone, how [fol. 86] long you worked the second time and so forth.
A. Let's see, I came there in October of 1945, worked until February, 1946, and then returned to my former home in Louisville, Kentucky.

Mr. Dunne: Would you mind keeping your voice up?

The Court: He came to work there in '45 and in '46 he went back to his home in Louisville, Kentucky.

The Witness: I went to work for the Louisville & Nashville Railroad in Louisville.

The Court:

Q. When did you come back?

A. 1947 as freight car man welder.

Q. You came back in '47. How long did you stay there then?

A. I left there then in 1948, April, I believe it was—no, it was in March, and I went to Florida.

Q. March or April of '48 then you left?

A. And I came back April of '49 this last time. I have been here since.

Q. You came back in April, March or April of '49 and have been there ever since as what?

A. As a freight car man welder.

Q. As freight car man welder?

A. That's right.

Mr. Downey:

Q. Mr. Miller, are you familiar with Track No. 10 in Car Shop 9 where they assemble cars?

A. I am.

Q. I just want you to tell the jury——

The Court: Keep your voice up, don't be afraid to talk [fol. 87] too loud.

Mr. Downey:

Q. Tell the jury from the time they began this new car construction in July of 1950 right up to the present time, how often, to the best of your recollection, have you worked on that Track No. 10?

A. I have worked on new cars since that time I think part of two days.

Q. You have only worked two days since 1950——

A. Part of two days, not the whole day.

Q. Tell us the occasions that you did work there and why?

A. One day I worked there one of the welders wanted to get off at noon, and he was told he couldn't get off unless there was a replacement, and I was the replacement. I went over there and worked from 12:30 until the close of the shift.

Q. All right, can you tell us on that occasion what time

card you had, that is, what was your designated shop on the time card?

A. Well, I don't recall whether I had—I know I charged the morning to freight car repairs, that is, other than new cars. Possibly I charged that afternoon to the shop work. Now I am not sure.

Q. Do you remember what was the other occasion when you worked there?

A. One other occasion was on one rainy day they were short of welders and I was sent over there for one day. I worked, I think, the full day that day.

The Court:

Q. Where were you working then when they sent you over there?

[fol. 88] A. Well, I worked for various places around there.

Q. The day they sent you over there, where were you working, were you working on old cars, repairs?

A. Yes, sir.

Q. They called you and you went over there?

A. That's right.

Q. Now, this day that you took this man's place, who arranged that, you and he together?

A. He and I and Mr. Hitke. It was on Hitke's instructions that I went there.

Q. In other words, Hitke told you it was o. k. to go and relieve that man that half day, is that right?

A. That's right.

Mr. Downey: That is all.

Cross-examination.

Mr. Dunne:

Q. See if I understand this correctly, Mr. Miller. Take '49 after you went back and '50, '51 up to July. Your regular work is freight car man welder?

A. That's right.

Q. And during all of that time except on these two occasions you were working as freight car man welder on the repair of old cars?

A. Well, the repair of old cars, fabricating material, various things, building buildings for the shop itself.

Q. Doing general welding work around there, but not on the new car line?

A. That's correct.

[fol. 89] Q. And on two occasions you went over to the new car line as a replacement?

A. That's right.

Q. And you said something about a shop order. When you were on the new car line you wrote down on the shop order the work, didn't you?

A. I probably did that day.

Mr. Dunne: No further questions.

Redirect examination.

Mr. Downey:

Q. Just one further thing. You mentioned you were actually making new parts at certain times during the last couple of years?

A. Oh, yes, I do that all the time. Whenever I go in the fabricating shed, a lot of days I am in there welding. But the biggest part of the time when I worked was on the loading track where they work loading cars and light repairs.

Q. So you make new parts some of the time and then you repair cars some of the time, and then on a couple of occasions you have been on the assembly line; is that right?

A. That's true.

Mr. Downey: All right. I have no further questions.

Mr. Dunne: I have no further questions.

Mr. Downey: That is all.

(Witness excused.)

The Court: Is this gentleman excused now?

Mr. Downey: Yes, sir.

Mr. Dunne: Yes, your Honor, as far as we are concerned.

The Court: Mr. Miller, you may be excused now and you [fol. 90] may return to Sacramento. Is that where you live, in Sacramento?

Mr. Miller: Yes.

The Court: You may return to Sacramento. You won't be called here again.

Mr. Downey: Mr. Black.

WILLIAM E. BLACK, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk:

Q. What is your full name?

A. William E. Black.

Q. Where do you live, Mr. Black?

A. 2836—18th Street, Sacramento.

Direct examination.

Mr. Downey:

Q. Mr. Black, you are employed by the Southern Pacific at Sacramento?

A. I am.

Q. What is your job there?

A. Freight car welder.

Q. Freight car builder?

A. Welder.

Q. How long have you worked up there for the Southern Pacific?

A. Ten years.

Q. Let's confine it to the last two years, that is the period of time since they have started this assembly line Track No. 10. Tell the jury how much of that time over the last two years you have spent working on the Track No. 10, the assembly line, and how much of it in other kind of work?

A. Well, I wouldn't know exactly. About half the time.

[fol. 91] Q. About half?

A. Yes, sir.

Q. Half that you are not on the assembly line, that half, what sort of duties do you have?

A. Well, part of it was heavy repair work and part was fabricating.

The Court:

Q. Part was heavy repair work and part is fabricating? What do you mean by fabricating? You tell the jury. I know what you mean but I don't know if they do or not.

A. It's building parts.

Mr. Downey:

Q. Building parts that they put on these cars on the assembly line?

A. Yes, sir.

Q. Well now, tell the jury how it is that you change jobs that way or why you change?

A. Well, by request of the company, they just move you is all.

Q. What?

A. They just have you moved.

The Court: By request of the company they just have you moved.

Mr. Downey:

Q. How have the periods of work gone? You say roughly half and half. Do you work a week on one and a week on another, a week on the assembly line and a week off, or does it run six months at a time, or what?

A. This last time, about a year straight I worked on new work, and before that I was working on repair work and somebody laid off and I'd take their place. They'd be late, I'd take their place.

Q. You say you don't actually make the request for a [fol. 92] change, it's the company that does that?

A. That's right.

Q. Now, you say you have been on that new track about the last year, have you, s' ?

A. Until recently, oh, about six weeks ago, I guess, I was moved again.

The Court:

Q. You were what?

A. I was moved.

Q. Moved where?

A. To where I work now, fabricating.
Q. Up to six weeks ago?
A. Approximately.

Mr. Downey:

Q. Tell us this: During your year or so experience on Track No. 10, what reasons, if any, have there been for work stoppage there?
A. Well, the weather stopped it maybe a couple of times or so, and then Christmas Eve, as a rule, so many go home they stop.
Q. What sort of weather? Does the wind affect the work there in any way?
A. I believe a couple of times it does.
Q. But so far as rain is concerned, you keep on working?
A. If there is enough people stay.

The Court: What?

The Witness: Yes, sir—maybe so many would go home they'd have to send the rest of them to the old work, old repair.

Mr. Downey:

Q. Send the rest to what?
A. Old work, old repair.

[fol. 93] Mr. Downey: I think that is all.

Cross-examination.

Mr. Dunne:

Q. Mr. Black, do you remember at the end of '50 and up until January of '51, they were building some automobile cars there in Shop 9?
A. I remember when they built automobile cars, yes.
Q. Did you work on the automobile cars?
A. Yes.
Q. Now, do you remember that for about a month they stopped the line entirely and then started over again on automobile cars?
A. Yes, sir.

Q. Now, we have been told here that the dates of that stoppage are from the 8th of January to the 12th of February of 1951. Before that stoppage were you working on new automobile cars?

A. Yes, I believe so.

Q. And welding?

A. Yes.

Q. What welding were you doing on them?

A. I was welding underneath.

Q. What part?

A. Chain welds.

Q. I didn't hear you.

A. The chain welds.

Q. The chain——

A. Welds.

Q. Was that done before or after the underframe was turned over right-side?

A. The car is practically built when you put those in.

Q. Is that still on the steel line?

A. Not on Track 10, no.

[fol. 94] Q. Is that after the wood has been put in?

A. Yes.

Q. Now, when you were on that job, you always did that same thing at the same place every day, didn't you?

A. Yes.

Q. Now, after they stopped the assembly line and then started it over again in February, did you go back onto the new automobile cars at that time?

A. Well, I don't remember if they still built automobile cars after that time.

Q. You don't remember that?

A. No, but after I left automobile cars I went to repair work.

Q. You went to repair work after you left automobile cars?

A. Yes.

Q. Then when you were on the repair side, you worked steadily at repair of old cars?

A. No.

Q. Most of the time you would, let me put it that way?

A. Yes.

Q. Except once in a while they would take you over and

send you to the new line when there was a vacancy, isn't that right?

A. That's right.

Q. Some man would be sick or would want to lay off for a day?

A. Or be late.

Q. Then he'd come back on the regular job and you would go back to repairing again, isn't that right?

A. That's right.

[fol. 95] Q. Then after that, do you remember that they started building some gonds?

A. Yes.

Q. Did you do any welding on the gonds?

A. Yes, the latter part of it I did.

Q. Do you remember what job you were doing welding on the gonds?

A. I was welding the brake brackets.

Q. What stage, what station were those welded on?

A. Track 10.

Q. Do you remember which station it was?

A. Second and third.

Q. Would that be before or after the sides had been put on the underframe?

A. Before.

Q. So the sides would be on the ground getting ready to go on the underframe?

A. Just down below, the next station.

Q. You would be there welding the brackets on those frames, is that right?

A. Yes, sir.

Q. When you were assigned to that work, you always worked at that same station every day, didn't you?

A. That's right.

Q. And all day long for eight hours?

A. Yes, sir.

Q. What was the next job you did after you went off that job of welding brake brackets on the gonds?

A. I went on the shed where they fabricate the material, welding.

Q. When you went into that shed where they fabricated [fol. 96] welding materials, that was the kind of work you did all day long, wasn't it?

A. Well, that takes—that's old work and new work.

Q. But all in the fabricating shed, isn't it?

A. Yes.

Q. Do you remember where you went after that?

A. That's until now.

Q. That is up till now. After they finished the program on the gonds, did you work on the new car line then?

A. Well, this bunch of gonds I am talking about, last bunch I am talking about—I'm getting ahead of myself, I'm sorry.

Q. The ones I was talking about was the thousand that were going to be T & N O gonds.

A. I stayed there and I worked on this other bunch here, the ones I'm working on now.

Q. When you worked on the ones that were going to be marked T & N O, your job there was welding the brake brackets on the ends, isn't that it?

A. No.

Q. Do they go on the ends or sides?

A. In the middle of the sides.

Q. As long as you were assigned to that job, that was the only thing you did?

A. That's right.

Mr. Dunne: I have no further questions.

Mr. Downey: That is all, Mr. Black.

The Court: May Mr. Black be excused, gentlemen?

Mr. Dunne: Yes, sir.

[fol. 97] The Court: You need him no further?

Mr. Downey: No.

The Court: All right, Mr. Black, you can go back with Mr. Miller and Mr. Nelson if you so desire. No need to return to the courtroom.

(Witness excused.)

Mr. Downey: Mr. McElroy, will you take the stand, please?

RAYMOND McELROY, called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

The Clerk: Q. What is your full name?

A. Raymond McElroy, M-c-E-l-r-o-y.

Q. Where do you live, Mr. McElroy?

A. 1616 Pennsylvania Avenue, West Sacramento.

The Court: Mr. McElroy, I wish you would speak out loud now. Just imagine you are in the shop working on those cars with the air hammers and everything else going. Talk out so that the fellows you are working with can hear you. If you do that we won't have any trouble. Otherwise I am going to have to keep prompting you all the time to keep your voice up.

Mr. Hildebrand: Mr. McElroy, I will sit back here and see if you can speak loudly and follow the Judge's idea.

The Court: You just imagine you are talking to Miller down there? Do you know Miller?

The Witness: Oh, yes.

The Court: You just imagine you are talking to Miller, [fol. 98] and we can all hear you.

Direct examination.

Mr. Hildebrand:

Q. Mr. McElroy, you are employed by the Southern Pacific as car man?

A. That's right.

Q. For how long have you been so employed?

A. 15 years.

Q. Have you worked in the shops at various capacities at Sacramento?

A. Yes, I have.

Q. In what capacities have you worked?

A. Well, as a freight car man and as a passenger car man. Now, that covers all types of work on both freight and passenger equipment.

Q. And at the present time are you the union representative for the car men in the dealings with the company?

A. That's right.

Q. Are you familiar with the agreement between the company and the union with reference to working conditions?

A. I believe I am, yes.

Mr. Hildebrand: We have the agreement here, counsel, and I would like to read into evidence just a couple of these rules, or rather, a couple of—yes, they are called rules.

Mr. Dunne: If your Honor will indulge me just a moment.

Mr. Hildebrand: I take it there is no objection to the rule?

Mr. Dunne: For purposes of the record and for other reasons the Court is concerned with, I make the objection [fol. 99] it is incompetent, irrelevant, immaterial, not within the issues. But I of course have no objection to foundation or authenticity of the document.

The Court: I don't know how the Court will rule until after the question is asked and I see the significance of it.

Mr. Hildebrand: I would like to show your Honor Rule 52 here that we propose to offer into evidence.

The Court: All right, ask your question.

Mr. Hildebrand:

Q. I will ask you if the following rule——

The Court:

Q. Are you familiar with Rule 52, are you, there?

A. Yes, I am.

The Court: All right.

Mr. Hildebrand:

Q. I will show you this rule book. Counsel doesn't object to the foundation of it. Is this the rule that is in effect at the present time in the agreement between the company and the union?

The Court: With particular reference to Rule 52?

The Witness: (Examining document) It is, yes.

Mr. Hildebrand: All right. I offer this rule in evidence then, your Honor. I would like to read it in the record.

The Court: You may read it to the jury. For the record, let the objection be overruled.

Mr. Hildebrand: (Reading)

"Running repairs and shop work, locomotives and freight cars.

[fol. 100] "Rule 52.

Forces assigned to running repairs"——

Q. Now, what are running repairs?

A. Running repairs are the freight car department or the passenger car department.

Q. Freight car department?

A. In the freight car department it would be equipment that comes off the road and has to be repaired and put back into service, and some of those repairs are made on loaded cars, that is, by that, certain articles are loaded in these cars that can't be taken out and placed in other equipment, and the repairs can be made on the car without unloading it.

The Court:

Q. In other words, the freight car comes in to the track with a particular wheel off and you leave whatever was in the car in there?

A. And jack the car up and take the wheel off, yes, sir.

Mr. Hildebrand: (Continuing to read)

"Forces assigned to running repairs will not be required to work on shop work at points where shop work forces are maintained except when there are not sufficient running repairs to keep them busy."

Q. Now, if you find that the men doing running repairs run out of work, does the company let them sit around or send them home?

A. No, the company places them on other types of work within that department, within the car department or within the freight or passengers, whatever department [fol. 101] that might happen to be they are working.

Q. Would the other types of work in that department include new car construction?

Mr. Dunne: Objected to as without foundation, incompetent, irrelevant, immaterial, and calling for conclusion.

The Court: I think the witness is qualified to answer it.

The Witness: It could be very easily new work or old work. There is nothing in our agreement that says that one man is compelled to work on new work, or neither does it say that he is compelled to work on old work. We have an agreement covering the entire shop in the car department and you can be transferred from one department to the other or you can request to be transferred by bidding a job in.

Mr. Hildebrand: Now we will go on with this rule. Next paragraph:

> "Shop forces assigned to locomotives and freight cars will not be used to perform running repair work except when the regularly assigned running repair forces are unable to get engines and/or freight cars out in time to prevent delay on train movements."

Q. Now, is that rule followed?

A. Yes, that rule is complied with as far as I know.

Q. And if an emergency arises, to prevent delay to train movements may the men be assigned to the work to prevent the delay, in case of a wreck, for example?

A. Yes, we have a regular wrecking crew there to handle [fol. 102] that. However, that wrecking crew could be filled from men any place in the freight car department if the regular crew isn't available.

Q. And if more men are needed, can they be indiscriminately assigned from any portion of the freight car department to any other portion of the freight car department?

A. That's right.

Q. Now, in training your apprentices, how many years of training are required?

A. Well, it's four years or eight service periods. Now, those eight service periods cover a little more than four years.

Q. Do apprentices work in new car construction?

A. Yes.

Q. Are apprentices kept in new car construction for four years?

A. No, no, you wouldn't make a mechanic if you kept them on one job all the time. That would be impossible.

Q. So are apprentices taken off the new car construction from time to time?

A. That's correct.

Q. Put into what other kinds of work?

A. Well, they might be placed on running repair lines, might be placed in the passenger car department, might be placed on air brake work, and we switch those apprentices around as near as possible in order to make mechanics out of them, in order to teach them the trade.

Q. Depending on the abilities of the men or the work to be done in connection with their abilities, are men ever [fol. 103] taken off new construction—new car construction work, and put into other work?

A. If some man happens to possess a little more ability on a certain type of work. However, ability isn't recognized too much when you have a group of upgraded men. But this one upgraded man might possess a little more ability, and that is left to the discretion of the foremen in those departments. For example, if permitted to do it, a foreman might ask another foreman for a man, and some fellow may be able to do that type of work a little more than the other one. He may want that particular fellow over there, because, after all, the main reason for those men is to get the work out.

Q. If the man that the foreman wants happens to be doing new car construction, can the foreman replace him with somebody else on the new car construction program and put him on running repairs?

A. That is true.

Q. Has that been done at times?

A. Oh, that has happened many times. It's a common ordinary occurrence.

Q. And within your knolwedge, has it happened at times that men in new car construction who may have special abilities have been taken over for temporary or special work in running repairs and replaced by other men?

A. That's right.

Mr. Dunne: Objected to as leading and suggestive and calling for conclusion.

The Court: I think the question is just a trifle leading. [fol. 104] Mr. Hildebrand: Possibly so. I think everybody knows the discussion we have had here, and I will try to put it a different way.

Q. Let me ask you about what are the practices in connection with whether men just simply do new car construction and nothing else. Are there times when they may be doing something else?

A. Well, it would be impossible to leave one man on new car construction alone. You couldn't do that. This man himself has certain rights that he might be able to bid jobs in in the passenger car department, he might bid into the saw mill, he might bid into the air room, making a request himself to be moved out of there, and—no, it wouldn't work out to leave that man on there completely. To my knowledge, practically everybody is moved.

Q. And so far as the men in new car construction are concerned, to your knowledge and information have there been any occasions when those men have been taken off new car construction aside from apprentices, even, and put to work on emergency repairs?

A. That's right.

Q. Tell us about that, or when would that arise or happen?

A. Well, I had one man not too long ago mention the fact that he had been placed on a particular job all the time and he wanted to know why it was that he wasn't permitted to change around. I told him we'd see what we could do, but at a later date I went back and talked to the man and he had——

Mr. Dunne: If your Honor please, this is going to be [fol. 105] hearsay.

The Court: You better stop right there, Mr. Witness. You can't tell us what conversation you had with some man, member of your organization. That is not permitted.

I think perhaps, Mr. Hildebrand, you had better reframe the question or else repeat it, whichever you like.

Mr. Hildebrand: Yes, your Honor. Withdraw the question.

The Court: Let the question be withdrawn.

Mr. Dunne: And the answer may go out, your Honor?

The Court: Of course the answer will be stricken. I didn't know there was one. I wouldn't qualify it as an answer.

Whatever portion of the answer there was, let it be stricken.

Mr. Hildebrand:

Q. Is this new car construction, is it under any shed or is it out in the open?

A. It's out in the open.

Q. Do you know of any occasions when the new car construction has stopped because of weather conditions?

A. Well, it could have been slowed down because of weather conditions, yes.

Q. Tell us how that would come about?

A. Due to weather and a great many of the men laid off because they didn't have rain suits, or some of them had colds and didn't want to continue to work in the rain, so they would lay off.

Q. Then what would happen to the rest of the men who were left?

[fol. 106] A. Well, they would continue to work and other men would be placed in these men's places, but it would possibly slow it down a little.

Q. Were those men at any times assigned from the new car construction under such conditions over to running repairs?

A. Yes. I can't recall any particular instance, but there have been times when I'd see fellows working on the line that would be working under the shed there in bad weather.

Q. Similarly, if there was a breakdown in construction or a shortage of materials in your new car construction, would those men that had been working on the new car construction be assigned over to running repairs or other work?

A. That could be, yes.

Q. And here is the rest of Rule 52:

"Shop work on locomotives is defined as including all work which cannot be handled within five days inclusive by the regularly assigned running repair forces maintained at the point where the work is per-

formed. Shop work on freight cars is defined as including freight cars placed on repair tracks except when work performed on freight cars in train yards and on cars under load or empty cars in transit or special loading placed on repair tracks would be considered as running repairs."

Now, the work, for instance, on Track 7, 6 and 5, heavy repairs, would that be classed under the last heading of shop work?

A. That would be, heavy repairs would be shop work. [fol. 107] Q. Then those would be on cars that were taken out of service that had been wrecked or damaged substantially and had to be worked on, is that right?

A. That's right.

Q. And that work was being done in the three tracks right next to the three tracks for the new car construction?

A. A lot of it is done right there, that's correct.

Q. Would some of these cars that came out from the heavy repair tracks be classed as rebuilt cars?

A. Rebuilt or reconditioned. It all depends on how badly wrecked they are.

Q. Would they be labeled, some of them as rebuilt?

A. Well, I wouldn't know that. I wouldn't know. That would be up to the management.

Q. And then this other track down here, Track No. 1, that would be almost solely running repairs?

A. That would be where the cars would be worked under load, yes.

Q. And would the men be used indiscriminately at times on all of these tracks?

Mr. Dunne: Objected to as calling for conclusion without foundation.

The Court: Well, if this witness knows, I think he may answer.

Mr. Dunne: It is leading.

The Court: It might be classed as leading.

Mr. Dunne: I am trying to avoid a conclusion after a [fol. 108] leading question.

The Court: This man should know, or he can say, "I don't know."

In other words, would they take a man from Track 10, put him at Track 1 or 5, and put him in 2 or over to 8?

The Witness: There is nothing in the rules that prevents from doing it, and they have done that.

The Court: Q. There is nothing in the rules to prevent it?

A. That's right, you have seniority all over that shop.

Q. I am not talking about seniority. I realize what seniority means, but there is a man working on repairs. That is on Track 1.

A. Yes.

Q. And there is a man on Track 7 that is taken ill, and he goes off the job, and it's an emergency and they take a man from Track No. 1 repairs and put him up to Track 7 heavy repairs?

A. That's right, they can.

Q. Nothing in the rules to prevent it?

A. Yes, that's right.

Q. Whether they do it or not, you don't know, is that right?

A. Many times they do that and I don't know about it because it's no violation of the rule.

Q. I know, but when you say you don't know about it, you don't know whether it was done or not. All you know is that it is not against rules and could be done; is that right?

A. No, that isn't right. I have seen men who have worked [fol. 109] on that job and have seen them working on running repairs.

The Court: All right.

Mr. Hildebrand: Q. Have you yourself seen them switched from one of those tracks to the other indiscriminately in your own observation?

Mr. Dunne: That is objected to as conclusion, as to indiscriminately. Let's get the facts, not these vague conclusions.

The Court: We don't need to quarrel over words.

Q. Have you personally seen men move from Track 1 to Track 10, more or less?

A. That's right. I see them and I will say, "What are you doing over here?"

"Well, I'm working over here now."

Nothing uncommon for that to happen.

Mr. Hildebrand: Q. Could a man bid to be so assigned from one spot to the other?

A. He can bid a job in that might be like a welder. Now, what I mean by that is that if a welder worked on that job and gave it up or resigned, he might bid this man's job in. Now, he wouldn't have to be assigned to that particular job because it's still in the freight car department. Some other man might be assigned to that position.

Q. And would all the work that is done in this freight car department come within the classification of the work that car men do?

A. Practically all of it. I think there's about two machinists out there and maybe some laborers and a few [fol. 110] sheet metal workers.

Q. Now, do you have an apprentice setup for welders as well?

A. No, the welding is handled in each truck. In other words, welding is considered as car men's work, is done by car men.

Q. And so if you have a car man who is a welder, if he has become a full-fledged mechanic, he is supposed to go through the apprentice training as well?

A. That's right.

Q. Does he have to go through four years of training as a welder, or can be qualify by four years of general training?

A. Well, he usually—we try to work the apprentices on their last year to weld, to be welders. That, of course, is not altogether possible due to the great amount of men that you do have and the few amount of welders. However, we do try to give an apprentice boy a certain amount of experience as a welder, because that is part of his qualification as a car man.

Q. And as apprentice and mechanic, will the average car man who is employed there at Sacramento be quite familiar and have experience in practically every department of the work to be done?

A. That is the effort of the organization and the management, because, after all, when he has completed his time he will be a mechanic, which they will have to use, and of course we are interested and I believe the management

is, too, to try to make mechanics out of these men and give them all that experience.

Q. So that the man should be qualified to work wherever [fols. 111-134] he might be sent in car men's work?

A. That's right.

Mr. Hildebrand: That is all. You may cross-examine.

Mr. Dunn: Your Honor——

The Court: Well, it's 4:00 o'clock, gentlemen. I don't want to keep this jury here after 4:00 unless it is an emergency or a doctor or somebody like that.

I take it there is no reason why you can't be here tomorrow morning?

The Witness: That's right.

The Court: So, ladies and gentlemen, at this time we will take our recess until tomorrow morning at 10:00 o'clock. You will remember, of course, the admonition.

(Thereupon, after the customary statutory admonition to the jury, an adjournment was taken until Tuesday, July 8, 1952, at 10:00 o'clock A. M.)

[fol. 135] After the recess

Mr. Downey: Mr. McElroy, will you come up, please?

RAYMOND MCELROY, being previously duly sworn as a witness on behalf of the plaintiff, resumed the witness stand and testified further as follows:

Cross-examination.

Mr. Dunne:

Q. Mr. McElroy, your position with the Southern Pacific in Sacramento is that of car man, is it not?

A. That's right.

Mr. Downey: Keep your voice up, Mr. McElroy.

Mr. Dunne: Q. And as car man, for some time past your work has been over in the saw mill, has it not?

A. That's correct, yes.

Q. How long have you been over in the saw mill?

A. Oh, approximately two years.

Q. That would carry us back around about July of 1950?

A. I imagine it would, yes.

Q. You never worked on the construction of new cars?

A. No, not these, no.

Q. Now, with respect to the location of Car Shop No. 9, where is the saw mill?

A. The saw mill is between car shop 3 and car shop 9—I believe that's—I am not too sure about direction now, I never was straightened out in Sacramento on direction. [fol. 136] I think that's about due east or that neighborhood anyway.

Q. It is about two or three hundred yards at any rate, away from car shop 9 or any of the parts of car shop 9, is it not?

A. Two or three hundred yards? Oh, no, it's further than that.

Q. Further than that?

A. Yes.

Q. And the saw mill falls under car shop 3, does it not?

A. Sir?

Q. The saw mill is part of car shop 3, is it not?

A. The saw mill is a part of car shop 3 and car shop 9. They do work for both of them.

Q. They do work for both of them, but it is under the general foreman of car shop 3, isn't it?

A. Supervision of car shop 3.

Q. So that we can understand, this car shop 3 is the passenger car shop?

A. That's correct, yes.

Q. And car shop 9 is the freight car shop?

A. That's correct, yes.

Q. The saw mill itself is in a definite locality in a single building, is it not?

A. Yes, that's right.

Q. And then you would get over to car shop 9 since you have been in the saw mill only occasionally, is that right?

A. I go over there as a local chairman of the car men many times.

Q. About how often?

A. That would be hard to say. Whenever I——

The Court: Q. Well, how often do you have these sug-

[fol. 137] gestions or complaints? That is the answer to it.

A. That is what it's hard to say, Judge.

Q. All right, but how often do you have them?

A. I couldn't tell you how many times, because when a grievance is reported to me is when I go over there.

Q. All right, how many times have you been over in the last year? That is a simple question.

A. I'd say, the last year, maybe 30, 25 or 30 times; maybe more than that.

Mr. Dunne: Q. At any rate, when you are not attending to a grievance and are going about your own work in the saw mill as a car man, you are over there in the saw mill proper?

A. That's right, yes.

Q. Now, in the shops up there, those are general shops, are they not?

A. Yes, sir.

Q. They are not division shops?

A. That is the general shop. The division is out in the train yard.

Q. What?

A. We have part of the division in the train yard, too.

Q. You do some work, car men do some work for the division there, don't they?

A. Yes, you have car inspectors on the division.

Q. Now, within the shop and within the limits of the work that the car men do, there are a number of general classifications that a man can bid in on, aren't there?

[fol. 138] A. That's correct; yes.

Q. For instance, if the saw mill has been working normally with its full complement of men and then a man leaves, then the practice is to notify by what you men call advertising, put a notice up on the bulletin board that there is a vacancy in the saw mill; isn't that right?

A. That's right, yes.

Q. And then any man who is a car man and is qualified to do that work can write out a little note which you call a bid, and he says, "I will take that job," isn't that right?

A. That's right, car men and upgraded men, we recognize those both.

Q. Upgraded apprentices?

A. Upgraded helpers and apprentices.

Q. At any rate, you have a list of men who are qualified then to take that kind of a job?

A. That's right, yes.

Q. And if you get more than one bid, then it's a matter of determining to whom that work is awarded?

A. In accordance with his seniority, yes.

Q. Now, among those classifications you have four car men jobs in the passenger shop, isn't that right?

A. Yes.

Q. That is in car shop 3?

A. That's right.

Q. And if a man bids in on that and gets the bid, then he stays over there in car shop 3 either until he is bumped or [fol. 139] bids in on some other job, isn't that right?

A. Or laid off, yes.

Q. Or laid off. Now, another place where he can specifically make a bid is in the saw mill, isn't that right?

A. That's correct, yes, sir.

Q. And if he bids in a job at the saw mill, then his job is in the saw mill?

A. That is true, yes.

Q. Then you have another one in the air brake room, isn't that right?

A. That's right.

Q. And then another place where a man can bid in on the job is over in car shop 9?

A. That's correct, yes.

Q. Do you have any other places that you bid on on jobs?

A. Yes, wheel shop, tender shop and the cable splicing.

Q. But that is the same general character of bidding in for a job, in a particular shop, isn't that right?

A. That's right, yes, sir.

Q. As a matter of fact, over in car shop number 9, if a man bids in on a job there as a car man, with the exception of welders he simply bids in a job in car shop 9, doesn't he?

A. Yes, that's right.

Q. Now, there is one exception to that. You have certain men who are qualified as welders, are they not?

A. Correct.

Q. All car men are not necessarily qualified as welders?

A. All car men are not what?

Q. Qualified as welders?

A. All car men, some of them don't spend the time to [fol. 140] learn welding, that is true, yes.

Q. So that among your men who are qualified car men, journeymen car men, some are qualified as welders and some are not?

A. Well, the biggest majority of the journeymen car men are welders. That is, they have had some welding experience. However, there are a few that don't have it, that's right.

Q. So in that case if they want welding done and need another welder in car shop 9, then they will put up specifically for a bid, advertise the job of welder, car man welder in car shop 9, isn't that right?

A. That's correct, yes.

Q. Now, you told us something about apprentices yesterday. An apprentice is a man who is learning the trade, isn't that right?

A. That's right, yes.

Q. And a car man does various types of work to be a qualified journeyman car man, doesn't he?

A. Yes, that is true.

Q. He will work with wood, isn't that so?

A. Yes.

Q. And he also works with metal?

A. That's correct, yes.

Q. And then there are some parts of even freight cars that require some considerable knowledge of the particular parts, isn't that so?

A. Some what, now?

Q. Some parts, like air brakes?

A. Yes, but car men do that, too.

[fol. 141] Q. I understand that. But the air brake work is work that requires some considerable training, isn't it?

A. Yes, just like anything else, there is a certain amount of it that each apprentice is supposed to be put on that job, yes.

Q. Now, if a man is a qualified car man, journeyman car man, he is supposed to do work in about any part of a freight car, isn't he?

A. That's right, yes.

Q. So when you have a man who is learning the trade,

an apprentice, you will want to have him work first doing one job to learn that, and then working some place else to learn something else, and so on, until he covered the whole car; isn't that right?

A. Correct, yes, sir.

Q. Now, wasn't it the practice up there, with a man who went on as an apprentice, to assign him to doing a particular type of work until he learned it?

A. Well, they place that man on a job and he, according to our agreement with management, he is required to work there so long, permitted to work there so long, insofar as it is possible.

Q. And then from there, if there is work, then you move him over to something else?

A. Yes, that's right.

Q. And he would work there a given period, then having done his time there, he moves over to some other job and does his time there and learns the next job; isn't that so?

A. That's right.

Q. And so for a series of periods he rotates around until [fol. 142] the objective is that he completes the work?

A. He rotates around as much as it is possible to put him around, yes.

Q. That is, as much as the work available to do that?

A. Yes. We couldn't put all apprentices on one job, we have to make sure there is the amount of mechanics in order to teach these men that work, yes.

Q. That is, if you are working on trucks, you can't have all the people that are working there apprentices. You have to have some senior men there?

A. That's right, yes.

Q. So where it is available you move them around so they can learn trucks, air brakes, and other parts of a freight car?

A. Yes, sir.

The Court: Is there any agreement on apprentices, that is, how many apprentices to each journeyman, or something of that kind?

The Witness: Yes.

The Court: What is the percentage of apprentices on these car men?

The Witness: One in seven.

The Court: For every seven journeymen they are allowed one apprentice?

The Witness: Yes.

Mr. Dunne:

Q. Then in addition to apprentices, you have other men who are not qualified journeymen. They are classified as [fol. 143] helpers, isn't that so?

A. Yes.

Q. So we can fill out this picture, suggested by the question that his Honor put, how many helpers do you have if there is a regular number for each journeyman?

A. No, there is no certain amount of helpers for a journeyman, no.

Q. That depends on the amount of work that has to be done or the type of work, doesn't it?

A. That's right. The duty of a helper is to assist a mechanic.

Q. Well, correct me if I am wrong, isn't this a pretty fair line: That you have to be a journeyman to work with tools?

A. Isn't that a pretty fair what?

Q. Line to draw between journeymen and helpers. If it's work that has to be done with a tool, then you have to have a journeyman there?

A. That's right.

Q. Now then, confining ourselves if a man as a car man bids in a job in shop 9, then what job he does there, what job he is assigned to do, is up to the supervising officer in shop 9, isn't it?

A. To assign the man to the job?

Q. Yes.

A. Well, the management and the organization has worked very cooperative along that line in many occasions.

Q. It does happen if a man has been working on a particular job and wants to move over to something else, he can come and make that request, can't he?

[fol. 144] A. That's right, and many times I have talked to Mr. Hitke about that and we have worked out something to the advantage of the job that was being done.

Q. Then if it is possible, if it can be worked out, then he would be taken off one job he was doing and assigned something else?

A. That's right, yes.

Q. But, at any rate, the work that the men do there is the work to which they are assigned by the supervising officer, in this case Mr. Hitke, general foreman, sometimes in consultation with you, at any rate?

A. Sometimes not in a position to what——?

Q. Sometimes in consultation with you?

A. Yes, that's true.

Mr. Dunne: I have no further questions.

Mr. Downey: That is all, Mr. McElroy.

The Court: Mr. McElroy may be excused then, gentlemen?

Mr. Dunne: Yes, sir.

Mr. Downey: Yes.

The Court: You may be excused then, Mr. McElroy.

(Witness excused.)

Mr. Downey: Mr. Davis.

Russell Shafter Davis, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: Q. What is your full name, please?

A. Russell Shafter Davis.

Q. S-h-a-f-t-e-r?

A. That's right.

[fol. 145] Q. Where do you live?

A. Broderick, California.

Direct examination.

Mr. Downey:

Q. Mr. Davis, you are employed by the S. P. at Sacramento?

A. That's right.

Q. Your job is what?

A. Car man, a bench helper.

Q. Be sure and keep your voice up. You were one of the men working next to Mr. Gileo the day he got hurt?

A. Right.

The Court: Keep your voice up, please.

The Witness: I have a sore throat.

The Court: Don't be afraid to talk too loud. We will excuse you if you do, but you have to speak out because this young lady over there in the jury box can't hear you. I can't hear you and I am sitting right alongside of you.

Mr. Downey:

Q. Who else was working right at the scene there when Gileo was hurt?

A. Fellow by the name of Bowers.

Q. B-o-w-e-r-s?

A. Right.

Q. What were you and Bowers doing?

A. We were stretching out the length of a grabiron to make the holes match for a rivet.

Q. What kind of a car were you working on?

A. Gondola.

Q. That was a gondola that was being built on Track 10, is that right?

A. I don't know, I believe it was.

Q. All right. And what was Gileo doing at the time?

[fol. 146] A. He had just finished welding some corners in the car.

Q. Was there any floor in this car at the time?

A. No.

Q. Where was he standing or kneeling or sitting to do this?

A. He was standing on the ground up through the bottom of the car.

Q. Where were you standing?

A. I was standing on the framework in the inside of the car just above him.

Q. Where was Bowers?

A. He was standing on the corner on the ground.

Q. And what was Bowers doing just before the accident?

A. Well, he was going to hit the iron, grabiron, to lengthen it out so that the holes would match up for a rivet.

Q. And hit it with what?

A. Sledge hammer.

Q. Will you tell us the approximate weight of the hammer he was using?

A. I judge about eight pounds.

Q. Tell us what happened then?

A. Well, he hit the grabiron and the sledge hammer glanced off onto Gileo's welding hood as he straightened up from finishing his job.

Q. Did you know Mr. Gileo was there?

A. Yes, I did.

Mr. Downey: I have no further questions.

Cross-examination.

Mr. Dunne:

[fol. 147] Q. I would like to get this so that I understand it. These are going to be pretty poor drawings, just intended to illustrate generally what was happening.

At what station were you men working on these gondola cars?

A. Well, I don't know as it's any definite way of describing the stage outside of the station where they put on these grabirons and ladders.

Q. First the trucks had already been assembled, hadn't they?

A. Right.

Q. Then they moved on down and then the bottom frame, underframe, had been put on upside down and some other work had been done?

A. That's right.

Q. By the time it got down to you, had the underframe been turned over so it was right-side up?

A. It was, and the end was put on and sides put on outside of the wooden sides that goes on these.

Q. That is what I want to come to. So far as the underframe was concerned, if you were looking down on top of it, very roughly it would look something like that, wouldn't it (indicating on illustration on blackboard)?

A. Quite a bit.

Q. There are other parts to it, I understand, but you would have the steel sides, the steel ends, and then inside of those you would have the cross pieces of the members that rest on the trucks?

A. Right.

Q. And then there might be some other cross pieces in down in here (indicating)?

A. That's right.

[fol. 148] Q. Now, at that time that had been placed on the trucks but didn't have any floor. Do I understand you right?

A. That's right.

Q. So that a man could get under it and then stand up through these members that make the underframe?

A. That's right.

Q. Now then, looking at it from the side (drawing on blackboard), you would have your two trucks with two wheels for each truck on each side, then you had the underframe resting on that as a bed; is that right?

A. That's right.

Q. Now, how much had been added to that underframe on top?

A. Well, that underframe was all built together, assembled before it came on the floor.

Q. That's right, it comes as a whole, eventually gets on there. But then you start adding other members on top of it, isn't that the way the car is built?

A. Steel frame on the side with upright supports.

Q. That is what I am getting at. By the time you men were doing the work, there was a steel side that had a top piece, didn't it?

A. Yes.

Q. Steel top piece. And then did it have various other steel members along the side?

A. That's right, diagonal and upright. At the end there, there wasn't no diagonal, just upright.

Q. Here (indicating)?

A. That's right.

Q. But that would represent it roughly. And that was [fol. 149] open so you could look through it?

A. That's right.

Q. When the car was completed, it would be completed by filling in these sides with wood?

A. Right.

Q. And putting a wooden floor on?

A. That's right.

Q. Now, at the end there are grabirons and ladders, are there not?

A. There's a ladder on one end and one side, and on the opposite side there's grabirons.

Q. Now, did you have an upright member there at the ends like that (drawing on blackboard)?

A. That's right.

Q. Then——

A. I'd say that first one there, the next one there, that one, that's right (indicating).

Q. That would be all that you'd have there?

A. Yes. The grabiron would go from the end over to the first upright.

Q. Well, really, what I have done, I have too much space in there, haven't I, for that first diagonal? It's out of shape, I appreciate, but this would be closer, and it would go from this upright member to the end upright member that you would have your grabirons, is that right?

A. That's right.

Q. Then on these cars, always on the corner, that is on the right-hand side of the forward end of the car, you have a ladder that goes to the top?

A. That's right (indicating on board).

[fol. 150] Q. (Drawing on blackboard) I may not have the right number in here, but we just want to understand what we are talking about. A stirrup here, and at the other end you have a stirrup and one or two grabirons?

A. Two grabirons, one close to the top and the other one close to the center.

Q. It would be like this (indicating)?

A. Yes, that's right.

Q. Now, so that we can understand this, which end of the car were you working on? Where the long ladder was?

A. No, that would be on the corner where the grabiron was at.

Q. So it was here (indicating), and Mr. Gileo was some place inside doing welding, was he?

A. He was between the end and front end of the trucks there, the wheels.

Q. Some place back, so he was at the end of the truck and working under the car, is that right?

A. No, he was working up on the bottom of the car, the framework in the corner.

Q. Where was he standing? Was he on the ground?

A. He was standing on the ground.

Q. And was working at this corner, is that it (indicating)?

A. That's right.

Q. But inside the frame of the car?

A. Inside of the side, yes.

Q. Somewhere about like here, if you were looking down? [fol. 151] A. That's right.

Q. Where were you?

A. I was standing almost directly over him, just a little in the back.

Q. Where you inside the frame or on the outside of the frame?

A. I was inside the frame, on top of the frame.

Q. Where was Mr. Bowers?

A. He was on the ground on the corner.

Q. Outside of the frame?

A. Outside of the frame, outside the car.

Q. As I understand it now, where was this grabiron that he was striking?

A. Come again?

Q. Where was the grabiron that he was striking?

A. It was the center grabiron on the corner there.

Q. And had it already been attached to these two members (indicating)?

A. It had been attached to the end of the car with a bolt.

Q. And what was he doing with it?

A. He was hitting it so that the hole would come over far enough to line up with the hole in the upright.

Q. (Drawing on blackboard) It was fastened on one end with a bolt?

A. Right.

Q. And then it had a hole through it and there was a hole through the other upright?

A. That's right.

Q. He was striking with a sledge to move it over so that one hole would come on top of the other one and you could put a bolt through, is that right?

[fol. 152] A. Line it up close enough to where they could put a rivet in.

Q. He was standing on the ground. Which direction was he striking?

A. Well, he was striking—well, like that car there, to the front end.

Q. Striking over that way to move it over (indicating)?

A. That's right.

Q. What was it, a sideways blow like that (indicating)?

A. Well, I'd say it would be more that way (indicating), or this way (indicating).

Q. Downward at an angle?

A. No, upward, upward like that (indicating).

Q. Oh, upward like that. And then as he was doing that he hit it and the sledge glanced off, is that it?

A. Right.

Q. And Mr. Gileo was down below straightening up, do I understand that correctly?

A. That's right.

Q. So that as this blow upward was being made, it glanced——

A. Uh-huh (indicating affirmative).

Q. And eventually Mr. Gileo was struck on his hood, is that right?

A. That's right.

Q. He had been doing some welding there?

A. That's right.

Q. And had a hood on?

A. Uh-huh; right.

Q. Now, will you tell us—his Honor I am sure knows what they are like, and I think I have seen them—tell us what these hoods are?

[fol. 153] A. It's a welding hood. It's made out of fabric material that is flexible and it has a dark glass on that keeps from having flashes.

Q. It's a hood with a square glass in the front of it?

A. That's right.

Q. It looks, looking at the front, like a medieval knight's helmet with a glass window on in the front of it, isn't that

about what it looks like (drawing on blackboard)? Something on that nature with a window?

A. Well, it's quite a bit, but it's out of proportion.

Q. I warned you I was a very poor draftsman.

The Court: I think you made the window a little bit too big.

Mr. Dunne: Yes, I am afraid I have.

Q. Did I understand you to say that—where was Mr. Gilco welding? Was it on the under side of the corner or at the corner?

A. It was right in the corner.

Q. And at the bottom?

A. On top of the frame, underframe.

Q. On top of the underframe?

A. Right.

Q. Well, does this arrow indicate in a general way the point where he was welding (indicating)?

A. Right.

Q. Did I understand you to say he straightened up?

A. He just got through welding and straightened up, he hadn't raised his hood yet.

Q. Did the sledge, when it glanced, leave Mr. Bowers' hands or did he continue to hold onto it?

[fol. 154] A. I couldn't tell you.

Mr. Dunne: I have no further questions.

Mr. Downey: That is all, Mr. Davis.

May Mr. Davis be excused?

Mr. Dunne: Yes.

The Court: Mr. Davis may be excused, gentlemen?

Mr. Dunne: Yes, your Honor.

Mr. Downey: Yes, your Honor.

The Court: All right, Mr. Davis, you may be excused. It won't be necessary for you to return this afternoon unless you want to.

(Witness excused.)

Mr. Downey: Mr. Hunter.

EARL B. HUNTER, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk:

Q. What is your full name, please?
A. Earl B. Hunter.
Q. Where do you live, Mr. Hunter?
A. Sacramento.
Q. What is your address?
A. 2816—19th Street, North Sacramento.

Direct examination.

Mr. Downey:

Q. Mr. Hunter, what is your job with the company?
A. Well, I am an upgraded helper and I do car man's work and also welding.
[fol. 155] Q. You work in Sacramento?
A. Yes.
Q. How long have you been there?
A. Well, it will be two years June 17th of this year—or it was.
Q. Now, it's been brought out here that it is just about two years now since they started new car construction on Track 10. Are you familiar with that work?
A. Yes.
Q. How much of your time have you worked on Track 10 in new car work?
A. Oh, approximately a year.
Q. And you have been there about two years?
A. Yes.
Q. Tell us how it has been, have you just had one shift of a year there and then back to other work, or has it been in several different shifts?
A. Well, when I was first hired back in car shop 9—I worked there previous, approximately five years—and when I was hired back in June 17th, I believe, in 1950, I was put to work on the new car line. So then afterward I was upgraded as a car man. Then I worked about a year or so in a riveting gang. Then I was sick. I was in the hospital about six weeks and off duty for about five months.

Then when I cam back to work, the doctors released me, why, I worked on the old repair work. I was supposed to be on limited duty, but——

Mr. Dunne: I am sorry, I don't like to interrupt——

[fol. 156] The Court: "I was supposed to be on limited duty." Try and keep your voice up, Mr. Hunter, will you?

The Witness: (Continuing.) It was recommended, I should say. And since that time I have been working on old repair work, but occasionally I do work on the new line, new repair line—I mean the new production line.

Mr. Downey:

Q. Calling your attention to the day of June 15, 1952, I will ask you to tell the jury what your assignments were on that particular day?

Mr. Dunne: Objected to as incompetent, irrelevant, immaterial. It's after this accident and too remote. I don't know what the purpose can be, Mr. Downey.

Mr. Downey: Well, just to show that men are assigned to the new track and then for reasons——

The Court: He has already testified to that effect.

Mr. Downey: Well, over a long period of time. But I meant to show on any one given day an assignment of part work on the new track, then transferred to old work, and then back to the new track.

The Court: I think it is a little bit remote as far as the date that you fixed is concerned.

The Witness: May I say something?

The Court: No.

Mr. Downey: I would like to make the same offer of proof as to June 16 and 17, 1952, your Honor. I assume the ruling is the same.

[fol. 157] Well, I have no further questions.

Cross-examination.

Mr. Dunne:

Q. As I understand this—please correct me if I am wrong, Mr. Hunter—up until the time of your illness and after you were upgraded, your work was on the new car lot?

A. Yes.

Q. This is before your illness?

A. Yes, before my illness.

Q. Then after your illness when you went back, you were to go back for limited duty?

A. Yes.

Q. And then at that time they gave you limited duty on repair work of old cars?

A. Yes, that's right.

Q. Although occasionally you would go over to the new car line when somebody was absent?

A. Yes.

Mr. Dunne: I have no further questions.

Mr. Downey: That is all, Mr. Hunter.

(Witness excused.)

Mr. Downey: Now, your Honor, the remaining witness is Mr. Gileo who is going to be, naturally, a considerable length of time. Should we begin now?

The Court: I think you might, unless you gentlemen want to agree not to.

Mr. Downey: I could use a little extra time at noon.

Mr. Dunne: If Mr. Downey would prefer not to put him on now, that is quite agreeable to me, your Honor.

[fol. 158] The Court: All right, then, ladies and gentlemen, at this time we will take our usual noon recess and we will reconvene again at 2:00 o'clock, please.

(Thereupon, after the customary statutory admonition to the jury, an adjournment was taken until 2:00 o'clock P.M. this date.)

[fol. 159] Tuesday, July 8, 1952—two o'clock p. m.

(It was stipulated the jurors were all present)

Mr. Downey: Mr. Gileo, will you come forward now and be sworn?

CHARLES M. GILEO, 304 W. Wisconsin Avenue, Sacramento, California, the Plaintiff herein, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct examination.

Mr. Downey:

Q. Now, you work for the Southern Pacific as a carman and welder, up in Sacramento, is that right?

A. I do.

Q. How long have you worked for them there?

A. Well, I started at the car shop when I first went to work there, October 23, 1941.

Q. And have you been working there steadily ever since?

A. Yes, sir.

Q. How old are you now, Mr. Gileo?

A. Forty.

Q. And before you worked with the Southern Pacific Company, what work were you in?

A. Oh, I worked up at Auburn for a while, cutting down trees for not too much money, and from there—before I went to Auburn, I worked for Burkhard-Richard Cannery, fruit and apricots and spinach and asparagus. I quit there in 1937, and 1937—I don't know, around about tomato time, [fol. 160] I quit, and about some time in October, they had a blowup and they called me back. But I wanted to go back into work conditions where I'd have a steady job, they put me back to work two weeks and I laid off again.

The Court:

Q. Who?

A. The company.

Q. Which company?

A. Burkhard-Richard; that's before I went to work at the S. P. shop.

Mr. Downey:

Q. Did you ever do any welding before you went with the S. P.?

A. No, sir.

Q. You learned that trade after you went to work there?

A. Yes, sir.

Q. Is that all that you have done in recent years, welding?

A. No, I worked on the loader track—which is the track that is being moved twice a day—I worked on that for—oh, I think about two or three years, I think.

Q. What did you do, repair work, on that train?

A. Yes, sir.

Q. Now, the evidence shows, I believe, without any dispute, that they began this new car construction up there about the middle of 1950, or July.

Is that correct, Mr. Dunne?

Mr. Dunne: July of 1950.

Mr. Downey:

Q. When did you first begin work on the new construction track in Sacramento?

Or, if it is a matter you have of record, I'll certainly accept it.

[fol. 161] Mr. Dunne: Well, I can't give you that, but I can give you the bids that he made from about 1946 on. I can go back to the beginning, as far as that's concerned.

Mr. Downey: I am just concerned with since this new track started, what work he had been in.

The Witness: I think it was——

Mr. Dunne: December, '49, he was working as a car foreman; then on the 9th of May, 1950, he bid in as freight car man, welder. Then, on the 11th of November, 1950, he bid in a job as passenger car man; then on the 16th of October—did I say November? That should have been September of 1950; then, on the 16th of October, 1950, he bid in a job as freight car man, welder. Then, on the 12th of February, he bid in a job as car machine shop inspector; but on that same day, bid in as a freight car man welder—that is on the 12th of February, 1951. And our records show he worked as a welder on new car construction from that time on, up until his vacation time in July, the end of July of 1951.

The Witness: That's right.

Mr. Downey:

Q. Well, does that sound about like your work record the last couple of years? Is that right?

A. That's right.

Q. So you have been on that new track on an assignment as a welder in making these new cars, from February until July 11, when you got hurt; is that as you remember it?

A. That's right.

[fol. 162] Q. Now, during that time, did you ever work temporarily on any of the other tracks on the repair work?

A. While I was on the new work?

Q. Yes.

A. Oh, just a couple of times, where right across from where I was working, that they rebuilt—it broke down, rather. I don't know how to explain this, I'll try to do it as best I can. This what they call a "bull", like a big vice and jaws, and has the round object on top, which they place the rivet through the ladder onto your grabiron, and they pull a handle and another jaw comes down and mashes the rivet onto it, which presses the rivet together to make it hold fast. It broke down, I don't remember just when; I know it was two or three months before I got hurt, I know that. And when they assembled it back, I finished my work in between there—we had about ten or fifteen minutes—and they put it back, and in order to make it hold—you know, make it steady, sturdy—I welded a few places on it, just to make it steady, that it wouldn't loosen too much.

Q. Are you talking about work on the new construction?

A. Yes.

Q. Well, was that where you used this machine that sets the rivets in the grabirons?

A. Right across from where I am.

Q. You say that broke down on a couple of occasions?

A. On one occasion that I know of, yes, it broke down.

Q. What did you do during the time it was out of commission?

[fol. 163] A. They were driving them by hand—by rivet, by hand.

Q. But your welding equipment wasn't used then?

A. I was doing my regular work, which is on the new

track. That is, doing these gondolas, now—not doing the automobile cars or anything—doing the gondolas.

Q. Well, during your work on these gondola cars, whatever period that was—I believe you said from April?

Mr. Dunne: The end of April, on.

Mr. Downey:

Q. Apparently, you worked on gondola cars from about the end of April, 1951 up until the time you got hurt. Now, during that stretch of time, were there ever any interruptions during the day when you'd be assigned over part time to work on repairs?

A. No, not in between that point, not that I can remember correctly.

Q. Now, the day of this accident was July 11, early in the afternoon, is that right?

A. Oh, I don't know, sometime around 1:30, 2:00 o'clock, I imagine; I don't know for sure.

Q. Tell the jury what you were doing just before you got hurt.

A. Well, I was welding on that picture that's on that—car picture that's on that blackboard there. I believe it's the A-end I was working on.

The Court:

Q. A-end of what?

A. A-end of the gondola. I'm pretty sure it's the A-end, that's the A- or B-end. I'm working on the inside, which is [fol. 164] about a space of about—oh, say about 18 to 20 inches in width, possibly a little more, I wouldn't be for sure. And I'm inside, and——

Q. And, this car had no roof on it, did it?

A. No, sir.

Q. And the flooring had not been put on?

A. No, sir.

Q. It had the sides, did it?

A. It had the sides, just as shown on the picture there.

Q. It had two sides; were the two ends in?

A. Yes, sir.

Q. Just like a box, without the bottom of the box, is that right?

A. That's right; no wooden sides on it, just the frame-work was up.

Q. You were inside, standing between the tracks, were you?

A. Yes.

Mr. Downey:

Q. What were you doing in there?

A. I was welding corners, inside. When they put these ends on, it seems like on the other end, though—there's two positions from where I'm working, they put these ends on. And they bring them by an overhead hoist lift, and they sort of heat them up a little bit, then they cut it with a torch. That's in order so they can get them to fit correctly. Sometimes, they don't have to cut them, if they're properly fit or properly made where that you won't have to bend them either way, and they slide right in, they won't have to cut them. Very few come that I had to weld, very few; all the rest of them were that you'd have to weld. And on the same car, I'd have three—six holes to slug.

[fol. 165] Q. You mean six in that same corner where you got hurt?

A. On the same corner where I work?

Q. Yes.

A. There was four holes that I have to slug up that were punched in the wrong places, I guess, and we'd slug them up and then they'd go in the next position, and they'd burn it over wherever they wanted it. Before I go into the part that I'd weld, it was cut; I'd try to keep away from them as much as I could. They'd work on one side and I'd come over here (indicating), start on the outside, weld all the corners, which is a long plate on top of the corner—a corner plate—weld all that along the side, then go up and catch the corners, these holes. Then, I'd go inside and get that last. And while I'd finish this, they were on the opposite side of me.

Q. Had you finished what you had to do in that particular corner of the car?

A. No.

Q. What were you doing just at the moment you got hit?

A. I was welding, just about the time that I—we have a trap on the hood, welding hood, we have a trap with a dark glass on the outside, clear glass on the inside. You use that for chipping; that way, it's not going in your eyes. Just about the time I stood up, I had my trap door open, just put a new rod in, I got hit. And I don't know, but I wasn't through with my job; I still had about an inch and a half or two inches to go yet, to finish that particular job.

Q. Another minute or two of work? Or, how long would that take?

[fol. 166] A. I'd say about approximately two, three minutes, because some of them jobs that come in probably would require a little fill-in, see? Fill-in that you would use sometimes, it would be, say, a half inch wide, and maybe a little wider; and therefore, you have to use a little full-in.

Q. Well, were you standing up straight when you got hit?

A. No, I wasn't standing quite straight, no, because welding there, I didn't have too much room to turn around. Also, when I'm welding, I have my elbows out this way (indicating) and I'm stooping over this way, see. Then, there's lots of times I put my left leg closer to the axle—to one axle and wheel, which is on my left leg.

Q. Well, the best you remember, stand up now a[illegible] now the jury about the position you were in when you got hit. Stand up and show them.

A. Well, the car is just like this (indicating); this is the way I am working——

The Court:

Q. No, just in reference to whether you were straight up or stooped over or sitting down.

A. I was similar, about like this (indicating), reaching over in my rod carrier, which is a little leather pouch, just about like this, with my trap open, ready just to put the tongs—my welding tongs—just getting ready so I could snap it.

Mr. Downey:

Q. Where were you hit? What part of your body?

A. Right back of my head.

The Court:

Q. Where?

[fol. 167] A. Well, I don't know just about where, but I got it right back here (indicating).

Q. Indicating the left side of the head?

A. Left side of the head.

Q. Just behind the ear?

A. Yes, sir.

Mr. Downey:

Q. Then what happened to you, after you were hit?

A. Well, when I got hit, I went forward and I come back, which I had my hand over my head this way (indicating).

Q. Were you knocked down?

A. Well, I couldn't went all the way down, because there was the axle there.

Q. Were you knocked unconscious?

A. I was.

Q. Where were you when you next remember?

A. I was laying outside on the ground, along the car.

Q. And where did you go from there?

A. From there, from where I had been laying?

Q. Did they take you to a doctor or what?

A. Oh, they took me to the Emergency Hospital, which is in the yards.

Q. And did you see a doctor there?

A. There was no doctor there, just a nurse.

Q. Did she give you some attention?

A. Well, she looked at me and she called up—I don't know who she called. She asked me which doctor I'd like [fol. 168] to see. The doctor I wanted to see wasn't there, so, I asked for—I forget his name, now. Anyway, from there, we went to the Sutter Hospital.

Q. To the Sutter Hospital?

A. Yes, sir.

Q. And did you stay at the hospital, or just go in for a little while for treatment?

A. No, they took me there in the ambulance and I stayed there about four hours.

Q. And what was done for you at the Sutter Hospital?

A. Just x-rays.

Q. Did you go back to work then, later that day?

A. Not that day, no, sir.

Q. When did you first go back to work?

A. Oh, I don't know just exactly, I imagine about three or four days after; I imagine three or four days, something like that.

Q. What did you do during that time, before you went back to work?

A. Stayed home.

Q. And how were you feeling?

A. Not too good, sir.

Q. Well, tell us what your troubles were.

A. Well, just at that time when I—my headache just, you know, come occasionally, and they would linger on through the day, then they'd go away and they'd come back, and repeated like that for a few days. Then it went away for a while; well, I thought I was feeling pretty good, so I went back to work. I went back to work and I worked up until the day my vacation started, which was July 24, 1951. And I had my vacation, which was two weeks. When I [fol. 169] come back from my vacation—I didn't go anywhere, I stayed home—and when I come back to work—I forget which day I did report to work—two weeks later, in the meantime I had put in a bid to the car machine shop.

Q. Did you get that job?

A. I did.

Q. And then you worked there until—what was it, September 3 or 4?

A. I worked then until September 4.

Q. Then what happened?

A. Well, I worked up until September 4; but before, when I went back to work, every twice a week or so, I had to go to the company hospital—which is the Emergency Hospital—and see the doctor, and he'd give me a few pills, you know.

Q. Why were you going into the hospital then?

A. Because I was getting these headaches. They would come—they wasn't coming too severe at that time, when I

kept going, but then just before September 4 rolled around, they were coming in pretty steady, and I missed a few days, and I felt pretty good and I'd go back to work.

Q. Well, then, after September 4, what happened?

A. Well, September 4, I went to the hospital that morning, which was about—I don't remember the time, but I went to the hospital. I saw the doctor and he says, "Well," he says, "I can't do any more for you here, so I'll send you to the San Francisco Hospital."

Q. And you came down here?

A. So I went to the San Francisco Hospital September 5. [fol. 170] The Court: Let the record show that's the Southern Pacific Hospital in San Francisco.

The Witness: Yes.

Mr. Downey: Yes, your Honor.

Q. You were admitted, according to the records here, September 5, 1951, and the last day you had worked had been the day before, September 4; and it shows that you were discharged April 14, 1952, but that during that period, you were in the hospital a total of only seventy-five days.

A. Well, they'd send me home, you know, back and forth; they'd keep me there two weeks and send me home for three. I'd go back for two weeks and they'd send me home for a month.

Q. What did they do for you at the hospital here in San Francisco?

A. Well, the doctors checked me over, checked my eyes and my elbows and my legs, and took x-rays, asked me if I had any sicknesses, which I did when I was a kid—diphtheria, measles, and so forth; and asked me if I had any other diseases, venereal, which I haven't, never did.

Q. Well, did they give you any treatment, aside from examining you?

A. No, sir, just a few pills.

Q. Then did you go back to work in April, after you got this discharge from the hospital here?

A. Yes.

Q. And have you worked since April?

A. The best I do, sir.

Q. How much of the time have you worked since April?

[fol. 171] A. Well, since April 17, I have never yet put in a full week.

Q. Why not?

A. When I get those headaches, I go home, check out. I got pretty sick there one morning—I think I was back to work about two weeks—they took me to the hospital, which at that time I saw Dr. Azevido.

Q. When you say you got sick, in what way? How did you feel?

A. Well, my headache got too severe that morning, I don't know for what reason. I had been stooped down a little bit; sometimes on my job there, you do quite a bit of stooping down, in order to find the number of the wheel. I have to take that down to keep; I don't know why, but they want a record of them wheels. And sometimes, if I have too many wheels, I can't roll them back and forth the way they should be, where you don't have to do too much stooping over so you can read the number. Most of the time, I'm looking way over. That morning, I think I had about twenty pairs of wheels that morning, all to be magneflexed, ready to go out.

Q. How did they take you to the hospital?

A. With the ambulance.

Q. Had you actually passed out, or gotten unconscious?

A. I wasn't quite unconscious, but I was awful sick, I know that much. They took me over with the ambulance; from the hospital, they took me home, and I didn't report to work until two days later. I felt pretty good and went back to work.

Q. In the last couple of weeks before you came down here [fol. 172] for this trial, have you been working regularly?

A. I had worked pretty regular, with the exception of one or two—possibly three days. But like I said, I have never put in a full week yet—that is, a five-day period—I have never put in a full week yet.

Q. Is that on account of headaches?

A. Yes, sir.

Q. Do you have any trouble with dizziness?

A. I get dizzy a few times with it, yes; and when I do, I just stay home in bed, mostly, around the house, don't do any work.

Q. Do you have to climb around on the cars while you are doing this car inspecting?

A. On this particular job that I'm on now?

Q. Yes.

A. No, sir.

Q. It's all ground work?

A. Yes, sir.

Q. Is that a job you can hold regularly? Have you got enough seniority?

A. Well, I don't know whether I can hold it regular or not. And I don't know whether—if I should happen to get "bumped", an older man, see, which I have only got I think about pretty close to six years of seniority; four years of that is apprenticeship.

Q. You have eleven years altogether, haven't you?

A. Well, I mean altogether with the company since 1941 is true; but then I actually have only, I think pretty close to six years which is seniority.

Q. Now, would you say that over the last month or so that you seem to be feeling better?

[fol. 173] A. At times, I do, and at times, I don't.

Q. Do you have a headache all the time, or just——

A. It's a dull headache.

Q. What's that?

A. It's a dull headache.

Q. You mean all the time?

A. I have one right now. I'm not just telling it because I want to have a headache; I have been having this headache now since they released me from the hospital. And times that I have to work sometimes, I work; when I don't really feel like working, I go to work, which I have to work.

Q. Well, would you say that it is getting better? You say at times it's a little worse or a little better, but on the whole, would you say that you are improving?

A. As a whole, I would say, yes, I am improving some. I still have some of those pills Dr. Azevido has given me; I still have a few of those left.

Q. Do you feel better if you're laid off the job for two or three or four days?

A. After I get sick on the job, you mean? Like I get a headache and stay home?

Q. Yes, if you have been off a few days.

A. I feel a lot better, and even when I go back after I'm—when I do lay off, when I go back to work; there's lots of days I feel like nothing happened to me, like I never been hit with a sledge hammer, you know.

Q. How does your neck feel?

A. My neck is sore.

Q. Well, tell us about it; in what way?

[fol. 174] A. Well, for instance, if I happen to turn real fast over to my right, it hurts me a little bit. Not as much as it would on my left, if I happen to turn fast, like somebody saying something, you naturally jerk around, it hurts. But if I just—like right now, if I wanted to turn my head slowly, it will hurt; it hurts now right in here (indicating).

Q. On the left side? Had you had any serious trouble with headaches before this accident?

A. Well, I had headaches before, yes; I don't know just what year it is. I think you have it in there. I went to Southern Pacific Hospital due to my arm. I went to the hospital, which I was having headaches then, but not as much as I'm having now, which has got nothing to do with this, or any part of this accident which I am applied in now. I was playing ball and I hurt my arm, which I cannot straighten; and I went to the hospital to find out what was wrong with it, and while I was in the hospital, I asked them to check my stomach, because I had some burning sensation inside, and I think I stayed there two weeks, I'm not sure. And in that two weeks, they had given me examinations for ulcers and what have you, and that kind of treatment; and in that two weeks, they had taken some sort of acid out of my stomach. And after I went home from that, they released me to go back to work, said there was nothing wrong with my elbow, which I know there is; and they said, well, if they happened to operate or something, they might leave it stiff. So I said, "I'll just let it go."

[fol. 175] In the meantime, they were checking over my stomach, too, when they pulled this acid out—I have never had no headaches since when they pulled that acid out of my stomach, which was a little carton, say, about 12 inches long, and it had cubes in it, and the acid they pulled out—the first tube, I'd say, had about three inches of fluid. What

type of fluid, what it contained or what happened to it, I don't know.

Q. You have always been somewhat inclined to be nervous, haven't you?

A. I have been nervous all my life, ever since I was a kid, nothing I can do about it. Don't imagine there's nobody else that can do anything about it.

Q. Did they say you had ulcers?

A. They never told me, no.

Q. But anyway, after that stay in the hospital, your headaches were relieved?

A. Headaches were relieved; I have never had a headache since; until the time I got hurt in 1951, never had no more headaches.

Q. Ever been knocked out before the accident?

A. I have.

Q. When?

A. In high school, boxing. Not as a professional or amateur, just to keep in sport. Naturally, the guy was bigger than I was, he dropped me, sure; but we had a mattress there that is from—I'd say between 7 to 8 inches thick. And I had occasions to wrestle in school, not professional or amateur, just as a sport at school. And I have been dropped then, too, but not in wrestling, not by [fol. 176] squeezing the head, or anything like that. The only thing I got there was too much pressure in my stomach. Naturally, the guy was bigger than I was, so he tapped me again.

Q. Now, in recent years, you have also had some trouble; you had an operation above your tail bone, or some sort of cyst?

A. A pilonidal cyst.

Q. And you had an electric shock of some kind on the job once, is that correct?

A. Yes, sir.

Q. Is that correct?

A. Yes.

Q. Then you had an injury once to your leg, is that right?

A. That's when I got the operation; that's all in one.

Q. Well, aside from that, is that about the extent of your

accidents with the Southern Pacific since you went to work with them?

A. Yes, sir.

Q. Ever had any serious automobile accidents?

A. No, sir.

Q. How much is your daily rate of pay as a car inspector?

A. Well, at the present time, it's $1.959.

Q. And you work an 8-hour day?

A. Yes.

Q. Is it any different pay as a welder?

A. No, sir.

Q. Was it the same rate of pay when you got hurt a year ago?

A. I beg pardon on that one. You said in the welding, which was at that time—when I got hurt, I was getting $1.93, and when I bid into that job, it was 2 cents less, $1.91.

Q. You make, anyway, between $15 and $16 a day?

A. Close to that.

Q. A few cents more now than you did when you got [fol. 177] hurt, is that right?

A. Yes, sir.

Mr. Downey: Do you have the earnings record, Mr. Dunne, available?

Mr. Dunne: I haven't it in figures, although——

The Witness: I earned $2400-something up to the day I got hurt; up to the time that I had gone to the hospital, which was September 5, 1951, I earned $2400 and something—some odd cents in there.

Mr. Downey:

Q. In the first eight months?

A. Up to September 4, 1951.

Mr. Dunne: I haven't had that figured out in total, but I do have his work records to indicate that up until the 11th of July, 1951, from the time he bid in this job—which was on the 12th of February—he was working five days a week, and was earning at the rate he specified, $1.93. I haven't had that computed.

Mr. Downey: I was wondering if you had the record since the accident, up to the present.

Mr. Dunne: Yes, I can give you a complete statement of his work record since the accident.

Mr. Downey: All right, if you would, Mr. Dunne. Thank you.

Mr. Dunne: It says 8 hours on the 11th—that is the day of the accident—which wouldn't be quite correct, because it happened before quitting time.

Mr. Downey: You don't have it summarized by months?

Mr. Dunne: No, I have it summarized by days and hours.

[fol. 178] Mr. Downey: That's going to be a long stretch.

Mr. Dunne: No, I don't think so. It shows that he was off the 12th, then 8 hours on the 13th; then the 14th and 15th were Saturday and Sunday. Then it shows 8 hours a day, five days a week, steadily until the 29th of August, when he had only 7½ hours; and 8 hours on the 30th, 8 on the 31st. The 1st and 2nd of September were Saturday and Sunday; nothing on the 3rd, 8 on the 4th and nothing after that is shown until the 17th of April of 1952.

Mr. Downey: September 4 of '51 until April 17 of '52, there is no work?

Mr. Dunne: That's right, between those two days.

Mr. Downey: Then what since?

Mr. Dunne: 8 hours on the 17th, none on the 18th, the 19th and 20th of April were Saturday and Sunday. Then, by weeks, he had a full 3 days the next week, not the last 2 days. Then the following week, 4 hours the first day, none the second day, 8 hours the third day, 7 hours 25 minutes the fourth, none the fifth day. The next week, he got in two full days, the first two days, off two days, and 5 hours on the fifth day. The next week, four full days and five hours on the fifth day. We're now in May. The next week, starting on the 19th of May, 3 full days, then 6 hours 10 minutes on the fourth day, nothing on the fifth day. The following week, beginning the 26th, 5 hours on Monday, 8 hours each the next three days, and there was a holiday in there, so that it carries over to the first week of June. [fol. 179] Nothing on the 2nd, four full days; and the following week, beginning on the 9th, a full day on Monday,

5 hours on Tuesday, a full day for the next two days, nothing on the fifth day. And on the week of June 16, a full day for the first four days, nothing on the fifth day. His statement—if I may summarize, your Honor—his statement that he did not work a full week is substantially correct; as I look at this hastily, there was only one week there in which he worked each day, and on the last day of that particular week, he got 5 hours, and not 8.

Mr. Downey: All right, thank you, Mr. Dunne.

Q. Now, Mr. Gileo, going back to this—to the way the accident happened—was it customary for you fellows to work so closely together, slinging hammers and whatnot around the corners of the cars?

A. Well, you work on a line of that sort, you have so much time to get your work in——

Q. Well, let me put it this way: Was it unusual for those two men to be hammering away at the same corner of the car where you were welding?

A. Well, been doing it all the time, up until the time that they come in with the idea they wanted to straighten out that corner bracket, where these grabirons—or handholds, as Mr. Dunne said—some of those grabirons or handholds, as you call them, are 18 inches, some are longer, some are shorter.

Q. I'm not talking about that one day, but you worked [fol. 180] there for several months before this happened. Did you usually have other men working right next to you when you were welding?

A. Yes, sir.

Mr. Downey: You may cross-examine.

Cross-examination.

Mr. Dunne: If you think anything I te. u is wrong, I wish you'd straighten me out; I've go some notes that I took from your record and it's a little fast to do it this way. I think this is right: You went to work as a laborer on October 22, 1941?

A. I always thought it was the 23rd, but that's all right.

Q. Well, maybe the 23rd was the first day you worked—you are correct, that was the day your application was

accepted, and you went to work the next day. And that was in Car Shop 9?

A. Yes.

Q. Then you worked as a helper and as an apprentice and worked gradually for some time learning the business?

A. Yes.

Q. And you also, during part of that time, started in to learn a little welding?

A. Yes.

Q. Then they finally made you a car man, so you were a journeyman car man?

A. Before I got to be a journeyman car man, they advanced me.

Q. Upgraded you?

A. Yes, apprentice, yes.

Q. But your date was when they made you a journeyman car man?

A. 4-6-46.

Q. That's what I had before me; this is one of your bids [fol. 181] on a job. So that your seniority date as journeyman car man is April 6, 1946, is that right?

A. That's correct, that's the date I went out for my time.

Q. Now, after you became a journeyman car man, after your seniority date in April of '46, by that time you were also qualified as a welder, weren't you?

A. I was.

Q. You passed some tests as a welder?

A. Yes.

Q. After that time, sometimes you bid in a job as a welder, didn't you?

A. Yes, sir.

Q. Then sometimes you'd bid in just as a straight car man's job?

A. Well, the only reason I would do that is because I didn't have enough——

The Court: Never mind the reason.

The Witness: What I mean——

The Court:

Q. Did you do that?
A. I did.

Mr. Dunne:

Q. And then at least at one time, you bid in a job as a car machine shop inspector?

A. Yes, sir, that's the same job I'm doing now.

Q. Now, up to the time you went into the hospital in 1948—in July of 1948, you had been having headaches for about two years, hadn't you?

A. Like I stated a while back—I believe it's about ten minutes ago—when I went to the hospital on this arm, and they took some fluid out of my stomach, after that was over, I had no headaches, I have had no headaches since then.

Q. Didn't you go back to the hospital in December of 1949?

[fol. 182] Mr. Downey: Whatever the record shows, I will stipulate to it; you may read any part you wish from the record.

Mr. Dunne:

Q. Well, let me ask you this: Didn't you complain of headaches when you went back to the hospital in December of 1949?

A. That's what I'm trying to remember, when I went to the hospital—if it's there, I must have gone to the hospital—I recall the time you say I was in the hospital, and the doctor at the hospital asked me again if I had had headaches; and I told him, yes, at that particular time. But I don't know—what I tried to do now is figure out whether I went to the hospital, as you said, in 1949—I don't quite recall why I went down there.

Q. Well, I've got some notes here, I'll see if I can help you out on that. Don't you remember you had some trouble with your left hip and left leg, that it bothered you? You woke up and you had trouble?

A. I recall it right now, that's the time I got thrown by the electric arc, that's right.

Q. Don't you remember this, that welding used to give you headaches, and every once in a while you'd bid off a welding job, because it bothered you?

A. I never bid off because it bothered me; the only reason I'd do it was to give my eyes a rest. And I'll do it any time.

Q. Didn't you tell Mr. Hitke you didn't want to do welding, because it gives you headaches?

A. At times, it would, sure, but not steadily.

[fol. 183] The Court: Well, nobody is criticizing you here for doing these things; you had a right to do them. If you wanted to bid on another job, that was your privilege. Don't think Mr. Dunne is criticizing you or finding fault with you; he just wants to get the whole thing in chronological order.

The Witness: I understand, your Honor.

Mr. Dunne:

Q. Now, Mr. Gileo, how did you happen to hurt your right arm?

A. This one (indicating)?

Q. Yes.

A. Playing ball.

Q. Playing baseball?

A. Playing baseball. It's got nothing to do with the S. P. Company.

Q. About when was that?

A. Oh, my God, I don't know; it was in the summertime, I know.

The Court:

Q. What year?

Mr. Dunne:

Q. Five or six years ago?

A. Oh, I think it was before I got that electric shock, or something like that.

Q. Was it in the last three or four years?

A. It was.

Q. And has it bothered you a little bit since?

A. My arm? Oh, it hurts, yes. That's why I have never

had nothing done to it, because the doctor told me there's a chance I might not use it, so I'll just leave it as it is.

Q. How has the grip in your right hand been since you got that injury to the elbow?

A. I can't squeeze as—I wouldn't be afraid to say that [fol. 184] you've got a stronger grip than I have, right now.

Q. Now, you've told us that in high school, you did some boxing and some wrestling, is that right?

A. I did.

Q. Did you ever do any tumbling?

A. No, because I don't know how. I never did know how, and I wouldn't learn it.

Q. Did you ever do any wrestling after you got out of high school, and while you were working for the Southern Pacific Company?

A. Yes. Want me to tell you when and why and how?

Q. Well, let me tell you and then you correct me, see if my information is right about this, because it may be wrong. As a matter of fact, didn't you do some stunts at a picnic that the Brotherhood gave?

A. Yes, that was just as a sport, in order to give the S. P. Picnic a little show, a little entertainment.

Q. Did you do that more than once?

The Court: Do what?

Mr. Dunne:

Q. What did you do? Tell us what you did. Was it wrestling?

A. Yes. Before this other—I don't know his name, I've forgot his name, but before, I'll say about five minutes before that, I made a few tumbles, yes.

The Court:

Q. It wasn't Gorgeous George, was it?

A. No, in the manner of wrestling art, not in the manner of as an acrobat.

Mr. Dunne:

Q. Have you put on a stunt like that more than once? [fol. 185] A. That was the only time, sir.

Q. Did you ever have any little stiffness in your neck while you were working for Southern Pacific, as a result of wrestling?

A. No.

Q. Did you ever have any stiffness in your neck at all?

A. Oh, a few times, I wake up with a "crimp" in my neck, but that's all.

Q. Did you tell the men around the shop once in a while that you had a stiff neck?

A. You mean before the accident?

Q. Yes.

A. Well, I don't know how to say this—just like you and I were working together, or working as a group, or a few friends talking, and naturally, I'd go like this (indicating), which lots of mornings I'd wake up at home, because I was sleeping on a pillow, and I cannot sleep on a pillow, and if I sleep on a pillow it hurts my neck, which since I have got hurt, I have never used a pillow. But before then, I used to use a pillow occasionally, and then I'd throw it away, because—I don't know, it just cramps my neck and I'd wake up possibly with a stiff neck. During the day, it would go away; I don't know just when or how, but it would go away, and wouldn't bother me until I use a pillow.

Q. Let me ask you about something else, Mr. Gileo. You have been working around there in the shops, sometimes as car man in the Freight Car Shop No. 9, sometimes doing some welding, and sometimes you'd work over in the car machine shop as an inspector, is that right?

A. Yes, sir.

[fol. 186] Q. Did you ever bid in a job over in the passenger shop?

A. At the truck shop, that is, passenger trucks, that's the only part of the passenger car. And then I don't know that very good, anyway; but that's the reason I bid out, because I didn't know the job very good, and never had any occasion to do it.

The Court: When we speak of "trucks" of course, ladies and gentlemen, you understand they mean the wheels under the car; they don't mean the trucks as we see them on the streets.

Mr. Dunne:

Q. Mr. Gileo, most of us laymen, when we say "truck", we think of an automobile truck that runs on the highway. When you say "truck", you mean the assembly, with the axle and the four wheels?

A. Right.

Q. And the thing that holds it in place and together, that you have on a freight car?

A. Yes, sir.

Q. And so we understand a freight car has two trucks——

A. Four wheels on each end of the car.

Q. And each pair of axles, or each four wheels, are known as a "truck"? One truck?

A. Right.

Q. Now, about the early part of February, the 12th of February, you bid in on a job as car man—freight car man, didn't you?

A. From the passenger shop, back to Car Shop 9.

Q. Back to Car Shop 9? And at that time, they were building automobile cars, weren't they?

A. Yes.

Q. Then you worked on automobile cars; and then, when they finished up that group, then you worked on these gon- [fol. 187] dola cars up until the time you were hurt?

A. Yes.

Q. Then, after that, with these few days off that you have indicated, you continued on welding on the gondola cars, up until you went on your vacation?

A. Well, the reason I was doing that——

The Court:

Q. Never mind about the reason. Were you doing it, is that right? Were you working as a welder on the gondola cars?

A. Yes, that's right. It's right.

Mr. Dunne:

Q. Then, just before you went off on your vacation, you put in a bid as inspector in the car machine shop, and got that?

A. Yes, sir.

Q. So that after you came back from your vacation, on that bid, you then went over to the car machine shop as an inspector?

A. I don't know whether it was that same day or not, but I did go to the job that I had put my bid on.

Q. To the extent that you have been working, that's the job that you have been working on since?

A. Yes.

Q. Now, I don't want to go into a lot of details about the automobile cars, but I do want to find out something about the job on the gondola cars that your were working on, the kind of work that was being done at the time you were hurt. I'm going to use what lawyers call "leading questions"; that is, when we say something, and then say "Is it right?" Now, if I misstate anything—because I don't understand these details—don't be misled by what I say. I want you to correct me. As I understand it, at the place where you [fol. 188] were working, by the time the car got there, the bottom frame was already on the trucks?

A. Yes.

Q. Then at your station, the sides were already on, were they?

A. At my station?

Q. Yes.

A. The sides and the ends.

Q. And also the ends?

A. Yes.

Q. Is that right?

A. Yes.

Q. Now, were they fastened in place yet, by the time they got to your station?

A. Yes.

Q. Weren't those fastenings only temporary fastenings?

A. No, they were riveted on just before they got to me, the next position before mine.

Q. When you were working there, you always worked at the same station, the same position, did you?

A. Yes, sir.

Q. And, as the cars came down the line, from station to station along the assembly line, the [illegible] end came first?

A. Yes.

Q. So that the trailing end, as it moved down the line, was the A-end?

A. Yes.

Q. And when the car stopped at your station, then, your job was at the A-end?

A. That's right.

Q. There is a welder there, working, then two other men that also work there at that same station?

A. Right.

Q. And at the other end—the B-end—they had the same kind of a team? A welder and two other men, is that right?

A. Yes.

Q. Now, when the car got down to that station then, with [fol. 189] you and the two other men, let me ask you this: At your station, were those two other men always the same men, Davis and Bowers?

A. Yes, sir.

Q. So when that car got down to your station where you and Davis and Bowers were, what was the job that Davis and Bowers had to do?

A. On one side of the car, facing—it would be to my right, on the opposite end, the other side of the arrow there, is the left hand side; they had a ladder.

Q. All right, this is supposed to be very rough, just to show the outline of the underframe of a car, if you were standing up on it and looking right straight down, as though it were down on the ground. I'll put a "B" here for this B-end and an "A" up here for the A-end; and where the cross is, it is supposed to indicate the same corner on the lower diagram where the arrow is pointing. Now, over on the other side was a ladder to go on, on the side, wasn't there?

A. Yes, sir.

Q. And that ladder, looking down on it, would be about there (indicating); and another ladder like it on the end, wasn't there?

A. Yes, sir.

Q. Then, over on the other side where the cross is up here, there were some grabirons on the side, and also some grab-

irons on the end, weren't there? Or was there a grabiron on the end?

A. There was supposed to be, yes, sir.

Q. Now, in addition to applying the ladders at the station where you were working, to applying the ladder and grab [fol. 190] irons, what other work had to be done there?

A. You mean on my part?

Q. Or on anybody's part.

A. Oh, putting on them ladders, putting bolts in them, tightening them up; and when they moved down to the next position, they would be riveted on—them grabirons and the ladders and the step.

Q. Now, Davis and Bowers were the men who put the ladders and the grabirons in place, weren't they?

A. Yes.

Q. And the only thing you did was welding?

A. Yes.

Q. What kind of welding was that, acetylene or electric?

A. Electric.

Q. You had a tong with a rod, and then that was attached up to your electric cable, is that right?

A. Yes.

Q. And you weld by applying the end of the rod to the point where you want it to weld?

A. Right.

Q. Now, what did you have to weld?

A. Weld on the end of the car, one end of the car, where they just put the grabirons on—one grabiron on top, one in the middle and one on the bottom. And then there's another one around the side on the end sill, and slits inside the end, inside the car. Then I had to weld this—what they call the "post pocket" on the corner—on the corners.

Q. That would be on that corner? The post pocket was also over on this corner (indicating)?

A. Yes, sir.

Q. Did you spot weld the ladders?

[fol. 191] A. The brackets—well, the brackets on the bottom, yes, sir.

Q. Then your job was spot welding the brackets on the ladders; did you do any spot welding on the grabirons on the other corners?

A. You don't spot weld grabirons.

Q. Did you do any welding on those at all?

A. No, just possibly, maybe if the hole is a little big, you probably line it up, then ream it out.

Q. But those are normally held in place by bolts?

A. Right.

Q. So your only welding on the outside of the car was spotwelding the bracket for the ladder on one corner?

A. No, on the ladder and that post pocket.

Q. Was the post pocket outside the car?

A. Yes, sir; yes, sir.

Q. That's the one that's on the outside of the car, shaped like that (indicating)?

A. A little cup in there.

Q. So they can put a pole in there to push it?

A. Yes, sir.

Q. That's on the outside of the end of the car?

A. One on each side.

Q. You weld that?

A. Yes.

Q. Then was there any other welding that you did of the outside of the car?

A. Yes, where your frame, your underframe—where the top portion of the frame would meet this way (indicating), sometimes it would be up, oh, possibly like that (indicating) on the end; sometimes maybe 9, 10, 11 inches, and you weld a bead.

[fol. 192] Q. Weld a bead on that?

A. Sometimes; then I'd weld all that post pocket solid.

Q. Then what welding did you do from the inside of the car?

A. That's where they cut the ends, in order to make them go inside without having to force them in, beat them in with a sledge hammer, or what have you, so they'd go in easier.

Q. In other words, if they didn't fit exactly, they'd put a little cut in them, so they'd have some give?

A. Yes.

Q. Then fit them in there?

A. Yes.

Q. Then your weld would be to fill up that space where the cut was?

A. Right.

Q. Is that right?

A. That's right.

Q. Now, which one of those things were you welding at the time you got hit?

A. On this corner.

Q. That is on this near corner, where I put the cross up here (indicating), is that right?

A. The way you got the arrow, it's pointing on the corner to my right.

Q. Which diagram are you talking about, the top?

A. That one right there (indicating).

Q. And would that be the near corner, the one nearest at this side?

A. That's right. I would always start there first, I would give them—in order for them to put up their bracket ladders, and straighten up what they had to do there, and give me a chance to finish up there on my job on this side from them. I tried to work away from them, work on one [fol. 193] side, because lots of times, they get too close, you get a weld flash. And I tried to finish up on this side first, which is my right; I tried to finish that first, then I'd move around to the other side.

The Court: All right, Mr. Dunne, I think at this time, we'd better take a recess.

(The jury was duly admonished and a short recess was had.)

(The following proceedings were had during the recess, in chambers, outside the presence of the jury:)

STIPULATION OF COUNSEL

Mr. Dunne: For the purposes of the record, so that the record may show this—and I want to be corrected now if I misstate this, because this is a posed stipulation: That at the beginning of trial yesterday, counsel on both sides indicated to the Court that there was a serious question as to whether or not the Federal Employers' Liability Act applied. In the course of discussion of whether that issue should be tried separately, we took some time and presented

our respective views. I handed the Judge a printed memorandum, and counsel for the plaintiff called the Court's attention to the note in 10 ALR that collects the cases dealing with this subject. The testimony, the Court concluded, should be taken, a jury was impaneled, testimony was taken and this morning the Court, in chambers, indicated that in the Court's opinion, and as a matter of law, the Federal Employers' Liability Act applied, and that he would so instruct the jury; and, indeed, at that time, it was suggested, [fol. 194] and I think counsel for the plaintiff indicated that he would move that the Court rule on that as a matter of law, take that issue from the jury and rule that the Federal Employers' Liability Act applied as a matter of law. It was then indicated to the Court that if the Court so ruled, I, for the defendant, would in any event like to complete the record on that issue, but that there was a posibility that counsel could agree on the other issues. Since then, there have been discussions, and counsel have agreed that if the record will show what I have just stated, and in light of the Court's ruling, they are willing to agree that the issue of negligence be decided in favor of plaintiff, and that issues, by their agreement, be withdrawn from the jury and that the damages be fixed in the sum of $7,000 to carry interest at the rate of 6% until discharged. In the event the judgment for the plaintiff is affirmed, counsel being agreed on that, and it being agreeable to the Court, there being no further issue, if the suggested stipulation is agreed to and approved by the Court, there is no need to keep the jury any longer; and it will be necessary then only for me to complete the record with whatever evidence I want to put in on interstate commerce. The Court will then rule as a matter of law on the question of interstate law and whether the Federal Employers' Liability Act applies; and if its ruling is in favor of the plaintiff, as the Court indicated it would rule, then judgment would be entered upon that ruling, because the other issues have been agreed to.

[fol. 195] Now, is that a correct statement?

Mr. Downey: That is a correct statement, and plaintiff stipulates to that statement.

Mr. Dunne: And, of course, the ruling being as a matter of law, there will be no necessity for any findings?

Mr. Downey: That would seem to be correct.

The Court: I'd say there'd be no necessity for findings.

Mr. Dunne: We're treating this situation as though it were a verdict directed for the plaintiff on this issue.

The Court: That's correct.

Mr. Dunne: And by agreement, there being no other issue, the jury may be discharged; we'll complete the record on this issue and the Court will then rule.

The Court: All right.

Mr. Downey: That is agreeable.

[fol. 196] After the Recess

DISCHARGE OF JURY

The Court: Ladies and gentlemen, at the outset of this case there was some discussion concerning legal matters which have been discussed by counsel in chambers. Those have been disposed of. The other matters which might have been submitted to you at the conclusion of the trial have also been adjusted satisfactorily to both parties so that there is really no further use of you ladies and gentlemen to determine the few matters that are left because they are purely and simply a question of law which the Court will have to rule upon.

Counsel have agreed that under those circumstances you ladies and gentlemen at this time may be discharged. I want to say to you that the Court appreciates your being here the two days. I have enjoyed the association and I hope you have, too.

(Whereupon the jury was excused and the following proceedings were had:)

Mr. Dunne: Now, if your Honor please, in agreement with the stipulation that the plaintiff has nothing more to offer in the way of evidence——

Mr. Downey: That is correct.

Mr. Dunne: ——we will then proceed with what additional evidence we want to proceed on, restricted to the issue of interstate commerce and the application of the Federal Employees' Liability Act.

[fol. 197] Mr. Hitke, will you take the stand?

HARRY J. HITKE, called as a witness on behalf of the defendant, being previously duly sworn, testified as follows:

The Court: Have you all your records here you require?

Mr. Dunne: Yes, your Honor, I am quite sure we have.

Direct examination.

Mr. Dunne:

Q. First, Mr. Hitke, to pinpoint this matter, do you recall the occasion when Mr. Gileo was injured?

A. Yes, I do, Mr. Dunne.

Q. Now, for the purposes of building these cars on the production line, was each car assigned a shop number?

A. Yes.

Q. And are you able to fix the shop number of this particular car?

A. Yes. I checked back over the records and it was number 726.

Q. Now, those cars were a particular series of 1000 T & N O cars, were they not?

A. That is correct.

Q. Before the cars were completed and went out of the shop, each one of those cars was stenciled with a number?

A. That is correct.

Q. Those were from 47,000 to 47,999, isn't that correct?

A. That is correct.

Q. Now, how did those numbers, T & N O numbers stenciled on the car, compare with the shop numbers?

A. They usually were one higher than the shop number.

[fol. 198] Q. One higher or one lower?

A. In other words——

Q. Well, the first car for the T & N O numbering, was 47,000?

A. 47,000 is correct.

Q. And your first car number in this series was No. 1?

A. That's correct.

Q. So your No. 1 would become 47,000?

A. That's correct.

Q. Your No. 2 would become 47,001?

A. That's correct.

Q. And this car was your account number 726?

A. 726, which would make it——

Q. 47,725?

A. That is correct.

Q. Now, first as to the organization of the shop, was car shop 9 in part of the general car shops in Sacramento?

A. It is.

Q. Are they in turn part of the general shop in Sacramento?

A. It's part of the general shops at Sacramento, yes.

Q. So far as the operating department is concerned, is the railroad divided up into divisions and districts?

A. Yes.

Q. And so far as divisions were concerned at Sacramento, what operating division was Sacramento on?

A. On the Sacramento Division.

Q. Where did that extend to and from?

A. From Oakland on—I don't know just how far north it goes, up to Gerber, I believe.

[fol. 199] Q. You said from Oakland; you mean from Sacramento, don't you?

A. No, from the Sacramento River to Gerber.

Q. And then on the other side it goes from Sacramento to Sparks, doesn't it?

A. To this side of Sparks, about ten miles this side of Sparks.

Q. Now, was the general shop at Sacramento a division shop or was that a general shop that in the organization is separate from the division?

A. It's a general shop that is separate from the division.

Q. And then within it it had other subdivisions, did it not, of which car shop number 9 was one?

A. That is correct.

Q. And you were general freight car foreman?

A. That is correct.

Q. In charge of car shop number 9?

A. Yes, sir.

Q. To whom did you report?

A. To Mr. Vance, superintendent of the shops.

Q. And to whom did he report?

A. To Mr. Russell, superintendent of motive power, and his assistant, Mr. F. E. Malloy.

Q. To whom did they report?

A. To Mr. B. M. Brown, general superintendent of mofor power with offices here in San Francisco.

Q. Now, you told us the other day that at the 1st of July of 1950 you undertook a program of new car construction. Do you recall that?

A. That is right.

Q. By the 12th of February of 1951 you had indicated [fol. 200] you were engaged in a new program starting on 500 automobile cars?

A. That is correct.

Q. And then that was followed by a program of building 1000 new gondola cars?

A. That is correct.

Q. Was that the series of 1000 cars that were to be stenciled as T & N O 47,000 to 47,999—to and including 47,999?

A. Yes.

Q. And it was one of those cars that Mr. Gileo was working on at the time he was injured, is that correct?

A. Yes.

Q. Now, in the course of carrying on that program of new car construction, was the general procedure of operation as to getting authority, building the cars, getting materials, providing labor, use of the shops, the same for all of those new car programs?

A. Yes, the same for all the programs.

Q. So that at least in the general aspects there is no difference between the building of the automobile cars and the building of the gondolas, is that right?

A. None whatsoever.

Mr. Dunne: Now, at that point, if your Honor please, so that we can follow that somewhat in sequence, I would like to introduce a copy which has been certified of the Resolutions of the Board of Directors, Southern Pacific Company, and of the Southern Pacific Equipment Company authorizing respectively for those corporations a [fol. 201] program which includes this 1000 gondola cars.

The Court: That will be admitted and marked as Defendant's A.

The Clerk: Defendant's A, first one. The second will be Defendant's B.

(Thereupon the Resolutions referred to were received and marked Defendant's Exhibits A and B respectively.)

Mr. Dunne: Now, if your Honor please, I would like to introduce a document consequent on that, the Agreement of September 29, 1950 between Southern Pacific Equipment Co. and Southern Pacific Company for the construction of a number of cars, including this 1000 gondola cars.

The Clerk: Defendant's C.

The Court: That will be admitted and marked Defendant's Exhibit C.

(Thereupon the Agreement referred to was received and marked Defendant's Exhibit C in Evidence.)

Mr. Dunne: Now, if I may, at this time, your Honor, I will trace down so far as title to those cars is concerned from then on until they eventually get out into use.

First, a copy of an agreement of July 1, 1951 between Southern Pacific Equipment Company, the builder, and George Smith and H. J. Wiley, purchasers.

The Clerk: Defendant's D.

(Thereupon the agreement referred to was received and marked Defendant's Exhibit D in Evidence.)

[fol. 202] Mr. Dunne: Next, and unfortunately, Mr. Downey, I have only one copy of this, agreement of July 9, 1951 between Smith and Wiley, the purchasers, and the Pennsylvania Company, for banking and trusts, which in effect signs over the last contract.

I may say, your Honor, that your Honor can follow in a general way what this is. The original contract between Southern Pacific Company and Southern Pacific Equipment Company is for the thousand cars. Agreement between Southern Pacific Equipment Company and Wiley and Smith was in two bites. This particular one covers only 380 of those cars which were to go under particular equipment trust arrangement. But the car that this man

was working on was among those that are included in this series numbers, and that is the reason why I wanted to identify that car.

The Court: All right, it may be admitted.

The Clerk: It will be Defendant's E.

(Thereupon the agreement referred to was received and marked Defendant's Exhibit E in Evidence.)

Mr. Dunne: Then in turn, if your Honor please, the next document is the bill collectible of Southern Pacific Equipment Co. to the Pennsylvania Company for Banking & Trusts, trustee.

The Court: F.

The Clerk: Defendant's F.

(Thereupon the bill referred to was received and marked Defendant's Exhibit F in Evidence.)

[fol. 203] Mr. Dunne: And finally, the bill of sale of Southern Pacific Equipment Co., agreeably to the other agreements transferring title of these cars to the Pennsylvania Company for Banking & Trusts.

The Clerk: Defendant's G.

(Thereupon the bill of sale referred to was received and marked Defendant's Exhibit G in Evidence.)

Mr. Dunne: And lastly, Southern Pacific Equipment trust agreement itself covering the series of equipment including this series of cars, and the lease of the equipment by the trustee under the equipment trust to Southern Pacific Company.

Now, the last stage in that, tracing title and rights to use of these particular cars, the last step I don't have a document for here, but it is a sublease by Southern Pacific Company permitted by the lease and the terms of the Equipment trust to T & N O, Texas & New Orleans Railroad or Railway Company, a Texas Corporation, which I stipulated with counsel early in the trial of this case was a subsidiary of Southern Pacific Company.

The Clerk: Defendant's H.

(Thereupon the agreement referred to was received and marked Defendant's Exhibit H in Evidence.)

Mr. Dunne:

Q. First, Mr. Hitke, after these cars are completed, and I am speaking now of this program of 1000 new gondolas that were to be marked T & N O, as the cars were com-
[fol. 204] pleted, what became of them?

A. Those cars were billed to Luning, Nevada.

Q. What do you mean by "billed"?

A. Billed on a regular commercial bill of lading to Luning, Nevada for commercial loading.

Q. That is to say, from the shop you shipped them out as commercial freight under a commercial bill of lading to Nevada, is that correct?

A. That is correct.

Q. And consigned to whom?

A. To Mr. Betterton.

Q. And in what capacity?

A. He was the agent for the owner.

Q. For the Pennsylvania?

A. For the Pennsylvania.

Q. Let's be accurate about it; for the Pennsylvania Company for Banking & Trusts?

A. That's right.

Q. Now, as to the material that went into these new cars, whose material was that?

A. The Southern Pacific Equipment Company.

Q. And where was it stored so that you could use it?

A. In a separate storage area in car shop 9 for the new car program.

Q. You indicated to us the other day that some of that equipment, some of that material, Southern Pacific Equipment Company bought from Southern Pacific Company?

A. That is correct.

Q. Now, was some of that material also purchased from outside suppliers by Southern Pacific Equipment Company?

[fol. 205] A. Yes.

Mr. Dunne: Just by way of example, if your Honor please, not offering this as any material for this particular

series of cars because I don't know that it is, but simply as example as to how that outside material was purchased, I would like to offer for illustration a copy of the purchase orders.

The Court: All right, let it be admitted.

The Clerk: Defendant's I.

(Thereupon the document referred to was received and marked Defendant's Exhibit I in Evidence.)

Mr. Dunne: For that same purpose, if your Honor please, as to materials, I would like to offer a series of documents indicating how material that was acquired from Southern Pacific Company was purchased by Southern Pacific Equipment Company, and Southern Pacific Company then billed for it and was paid.

The Clerk: Defendant's J.

(Thereupon the document referred to was received and marked Defendant's Exhibit J in Evidence.)

Mr. Dunne:

Q. Now, you were asked some questions the other day about the way the men were paid. These men, as has been indicated, who worked on the new car construction, were Southern Pacific employees, were they not?

A. Yes.

Q. And so far as the check that they received and the way they were paid, the men that worked on new car construction were paid by Southern Pacific Company just as men [fol. 206] in any other part of the shop were paid, were they not?

A. That is correct.

Q. These were men on the Southern Pacific payroll paid by the Southern Pacific Company?

A. Yes.

Q. And then Southern Pacific Company in turn billed Southern Pacific Equipment Company for that labor cost on the new car construction, did it not?

A. That is correct.

Q. And in addition, for certain other charges that covered overhead, handling expenses and things of that sort?

A. That is correct.

Q. You have seen those documents yourself, have you not?

A. Yes.

Q. I want to make sure that I have the right one, Mr. Hitke.

I am going to offer this and ask if this isn't the copy of the series of papers for the billing, of payroll and other items in connection with the new car construction program. This one evidence covers this particular program, but for the full month before Mr. Gileo was injured, June, 1951.

A. (Examining documents) Yes.

Mr. Dunne: We will offer that as the next exhibit in order.

The Clerk: Exhibit K.

(Thereupon the document referred to was received and marked Defendant's Exhibit K in Evidence.)

Mr. Dunne:

Q. Mr. Hitke, was there a method of identifying a general program such as the program for the thousand gonds [fol. 207] for T & N O?

A. By shop order number.

Q. Do you recall what the shop order number for that thousand cars was? I am not talking about the shop order number but the purchase number.

The Court: Would they be a shop number or purchase number?

Mr. Dunne: They would be both, if your Honor please.

The Witness: The purchase order number for the thousand gondola cars is P3061.

Mr. Dunne:

Q. That was Southern Pacific Equipment Company's purchase order number?

A. That is correct.

Q. Then for the work to be done under that purchase order, did you in the shop, car shop 9, have shop numbers?

A. Shop order numbers, yes.

Q. What were the shop order numbers for this thousand gonds?

A. 2807.

Q. What was that for, the labor?

A. The labor and material for assembling the car.

The Court: 2807?

The Witness: 2807, yes.

The Court: The material was already there belonging to the equipment company, wasn't it?

The Witness: Well, on each group of cars we assigned the shop order number to that group of cars, and then each month we paid for the material and charged it [fol. 208] against the group of cars that went out during that month, and the auditing department makes the transfer of the money as cars are completed.

Mr. Dunne:

Q. Do you happen to know this, Mr. Hitke: That for rating purposes and other purposes the Interstate Commerce Commission requires the report of the exact cost of cars?

A. That is correct.

Q. You kept the figures that would underlie the making of such a report?

A. That's right.

Q. And also, if your Honor please, you will find that in those documents for the equipment trust there are requirements that the minimum cost of the equipment be as fixed by those documents, and the cost was also kept, these cost figures for that.

Now, I want to show you, and I happen to have here, Mr. Gileo's time card, Charles Gileo, Account No. 3016, "E Car Man W"—that would be freight car man welder, would it not?

A. That is correct.

Q. This one happens to be for the date on which he was injured, 0711/1. That would be July 11, 1951?

A. That's right.

Q. Now, on that, in writing, do you recognize that as being his writing?

A. Well, I couldn't say that offhand. I didn't pay much attention to this writing.

The Court: He is still here, let's find out.

Mr. Downey: Is this your card?

[fol. 209] The Court: Is that your handwriting, Mr. Gileo?

Mr. Dunne: Is that your writing? Possibly not, because this is the day he was hurt.

Mr. Downey: Yes, this is his writing, signature Charles M. Gileo.

The Court: All right. It is stipulated then that the handwriting—what is it, in pencil, Mr. Dunne?

Mr. Dunne: Yes, in pencil.

The Court: Written in pencil is the handwriting of the plaintiff in this case.

Mr. Dunne: That is as to the work done and as to the hours, and as to his own signature.

Q. There is an initial down here, "JM." That is Mr. Moore?

A. James Moore, yes.

Q. Mr. Gileo's immediate superior foreman?

A. That is correct.

Q. I notice on this it shows the number of hours, general type of work: Welding ends, and then it shows under the column "SO or Equipment NO", Number, 2807.

A. That is the shop order number for that particular program.

Q. Was it the practice for the men working on the new car construction in each instance to make out their cards in this form, and on the new car construction to show the shop order number?

A. That is correct.

Q. And that was for purposes of charging those costs then against those shops numbers?

A. That is correct.

[fol. 210] Mr. Dunne: We will offer this in evidence as exemplar of the type of time record kept.

The Court: That is the usual thing, each man has a time card for each day, and whatever work he does is charged up to the shop card number?

The Witness: That is correct.

The Clerk: Defendant's L.

(Thereupon the card referrred to was received and marked Defendant's Exhibit L in Evidence.)

Mr. Dunne:

Q. Now, Mr. Hitke, some of the witnesses produced by the plaintiff to the extent of their own experience gave us some testimony as to the matter of assignment of jobs. In the course of doing that work in car-shop 9 as a whole, would you have some superiors immediately under you?

A. Yes.

Q. Who were they?

The Court: Wait a minute. "Superiors immediately under you"?

Mr. Dunne: I meant supervisors, which is quite different. You are quite right, your Honor.

Q. Supervisors immediately under you?

A. Yes, Mr. Darryl Firth was an assistant general foreman, and some six other foremen on the assembly line.

Q. Well now, that is on that side?

A. That's right.

Q. Did you also have another assistant general foreman? [fol. 211] A. I have an assistant general foreman on the old work with several supervisors under him.

Q. Well then, you had a Mr. Firth who is assistant general foreman, whose supervisory work was confined to new car construction, is that right?

A. That is correct.

Q. Then what men, supervisors, would he have under him?

A. How many or——

Q. No, no, what type of men, how many and what did they do?

A. Well, he had six supervisors under him on the new car construction line.

Q. Who were they and what did they supervise?

A. One of the supervisors took care of assembly of trucks, the assembly of underframes, the application of sides, and the next supervisor took care of the application of ends, the reaming of various parts on the car in the next position, the riveting of the ends to the sides and to the underframe, the application of all safety appliances, and the riveting of the sides to the underframe.

Q. Well, is this a proper statement—if not, I want you

to correct me, because we want this record to reflect accurately what this organization was: But you had various foremen under your assistant general foreman who were immediately in charge of various sections of the assembly line for the new cars, that right?

A. That is correct, yes.

Q. Each one would have his own section?

[fol. 212] A. On section of the line.

Q. Then under him he would have his particular crews, is that right?

A. That is correct.

Q. Now, was that assembly line—how was it set up? Was it for various stations, or was the work done haphazardly as cars were moved along?

A. It was set up at various stations. A certain type of work was to be done at each station.

Q. Did you have a definite number of men assigned for each one of those stations?

A. That is correct.

Q. Now, in that assembly line when it was operating, a man was assigned to a station. Did he work at any other station or only at that station of his own?

A. He was assigned to that station and worked at that station unless the supervisor would move him to another location on the line.

Q. In the course of setting up that assembly line, did you also set it up to provide for a time interval at each one of those stations? I mean, did the whole line move at a given time?

A. The whole line moved at a given time, yes.

Q. You would figure the work out so that at each station that could be done then within the time for a move?

A. That is correct, yes.

Q. Do you happen to recall what that time for each move was on the line with the gonds?

[fol. 213] A. At that time it was running 18 cars a day and they moved every 25 minutes.

The Court:

Q. Some men must have finished their jobs quicker than the other fellows, didn't they?

A. That's right. The men work differently. One may

start his job and finish it in maybe 15 minutes. The next man would take 20 minutes to complete his job. So as those men got done with their work they'd go off to the side and wait for the next car to move up for them.

Q. They wouldn't go down the line and help clean up?

A. No.

Mr. Dunne:

Q. That is, you had teams, teams just do that and all four work together as a unit, is that right?

A. That's correct, yes.

Q. Would the absence of any one of those men on any one of those stations in the line—what effect would that have on the movement of the whole line?

A. It would stop the moving of the line until that particular job was filled.

Q. Now, was it the practice, so far as the men on the line, assembly line for new car construction, to assign them away from the position in which they were working under a particular foreman unless they were assigned away totally to an entirely different job?

A. That is correct, none of the men were moved from that line unless for some special reason I was contacted and we assigned them to another job altogether.

[fol. 214] Q. For instance, a man from that line might be assigned over to the passenger truck shop?

A. That's right.

Q. And then he'd be over there until he got a new assignment, is that right?

A. That is correct.

Q. Or he might be assigned off that line to the air brake shop?

A. That is correct.

Q. But then he'd be in the air brake shop until he got a new assignment?

A. That is correct.

Q. If a man were assigned on that line under a particular foreman, did he stay there until he got a definite assignment to some other job there?

A. He did, yes.

Mr. Dunne: I think I am almost through, if your Honor please. Let me check up on one or two other matters.

The Court: That is all right. I will say this: That if you find you have overlooked anything, you and Mr. Downey may stipulate that it may be incorporated in the record and I will see that it is done, if that is agreeable.

Mr. Dunne: I think not. I think with the testimony that we have had and with these documents, the picture is pretty well painted. There is perhaps only one other question I would like to put to Mr. Hitke, which he may or may not know of his own knowledge.

Q. Do you happen to know whether Southern Pacific Equipment Company also built new cars for P. F. E., Pacific Fruit Express Company?

A. I know that they have, but that is out of my territory and I wasn't directly connected with it.

[fol. 215] Q. That is, that was no part of your job?

A. No.

Mr. Dunne: There is one other matter I would like to complete this record, to introduce a copy—I have a certified copy of Southern Pacific Company's Certificate of Consent to Self Insurance under the State Workmen's Compensation Act, to complete the record to that extent.

The Clerk: Defendant's M.

(Thereupon the certificate referred to was received and marked Defendant's Exhibit M in Evidence.)

Mr. Dunne: For the purposes of the record, if your Honor please, I would like to introduce an order of Southern Pacific Equipment Company used by it when ordering cars to be manufactured by what we might call an independent manufacturer, in this case the Pullman Standard Car Manufacturing Company.

The Court: All right.

The Clerk: That will be N.

(Thereupon the order referred to was received and marked Defendant's Exhibit N in Evidence.)

Mr. Dunne: That, of course, if your Honor please, has no direct bearing to this program, I want to make the record

clear. This is when they decided to buy cars from the manufacturer, entirely an individual manufacturer.

Q. I think just one other question, Mr. Hitke, and if it requires any qualification, I want the qualification. Is this [fol. 216] correct: That in the course of construction of these new cars on the assembly line, if a car man in the car shop number 9 was assigned to new car construction, that was his only work until he got a definite assignment to some different kind of work?

A. That is correct.

Mr. Dunne: I have no further questions, your Honor.

Mr. Downey: I would like to ask one further matter.

Cross-examination.

Mr. Downey:

Q. Mr. Hitke, do you know that car man Mr. Hunter who appeared here in court this morning as a witness?

A. Yes, sir.

Q. Now, referring to the 15th, 16th and 17th days of June last past, 1952, I will ask you if these facts are correct to your recollection: That on June 15th he worked two hours on the new car construction line on Track 10; that he was then for the next four hours in the day placed on old car repair work, and then he completed the last two hours of the day by working again on the new car line.

Then on June 16th that he worked the full eight hours on the new car line, but that on June 17th he was taken off the new car line and put to repairing an old car which had been taken out of service for badly needed repairs for the entire day, that car being No. SP-70015; and then again that he resumed his regular duties on the new car line on the 18th of June.

Just a moment. I offered that proof this morning and I [fol. 217] still make offer to prove it if those facts are denied. Obviously Mr. Hunter isn't here in court, but I can have him here again tomorrow morning. I am not asking the question to be impertinent, sir. The objection to it had been made this morning, but it is an unusual situation. I don't know whether Mr. Hitke is now my witness or whether

he appeared now as Mr. Dunne's witness, and I have the right to impeach him.

The Court: Well, I don't think we need quarrel about that.

Mr. Dunne: I objected to it this morning, and I would object to it as a matter of affirmative proof. Counsel on the other side was good enough to let me put some rather broad questions for the purpose of covering shortly a situation. Now I am not objecting to it now, because I think in view of that fact that I took advantage of that opportunity to do it that way, I think counsel is entitled to test, and I don't object to him testing.

The Court: Very well.

Mr. Downey:

Q. Are those facts true, Mr. Hitke?

The Court: Can you answer that question?

The Witness: Yes. Over that period of time Mr. Hunter was assigned to old car work, and due to absenteeism on the new car line, like in that one case that you stated two hours, he filled in on it for two hours. In a lot of cases we have men on the new car line that visit our doctor. When they are gone for that one hour or two hours, whatever the case [fol. 218] may be, we have to draw a man off the old car line and put him on the new car line in order to keep the new car line going. When the man comes back from the hospital or from visiting the doctor, he takes over his own station, the man that was borrowed goes back to his own job.

The Court: I take it, in other words, if a man on the job there in new car construction cut his hand or cut his foot or got a piece of steel in his eye, or something, he would have to leave the job and you would pick somebody else up that was on old work and put him in there until the man came back from the hospital or from the doctor or dentist, whatever the delay may be. That is what you mean?

The Witness: That is right.

The Court: Does that answer your question, Mr. Downey?

Mr. Downey:

Q. Well, it is your testimony that Hunter was not at that time assigned to new car work regularly?

A. If I understood your question correctly, that was June of this year?

Q. Yes.

A. That's right, he was not assigned to new work, because after he was off sick for several months his wife called me up one evening wanting to know if I couldn't find some light job for him to do where he could come back to work, because they really needed the money. So I lined up a job on the old car work for him and that's his assignment and is still his assignment as of today.

Mr. Downey: I have no further questions.

[fol. 219] Mr. Dunne: I think he testified that he was under restrictions.

The Court: Yes, because you didn't hear the answer and I repeated it to you.

Mr. Dunne: That's right, that was at that time. I think he was the man who testified that he had had some heart difficulty and when he came back he was under restriction as to the work he could do.

I have no further questions.

The Court: All right, thank you.

(Witness excused.)

The Court: Well then, if the matter has been submitted, at this time the Court will order judgment on behalf of the plaintiff in this case in the amount of $7,000, it being understood that if an appeal is taken in this case, that the rate of interest to apply in that judgment has been stipulated as being 6 per cent rather than the usual legal 3.

Mr. Dunne: May I suggest on the record to the clerk that the form of order that he enters be not the usual form, because in this peculiar situation your Honor is ruling as a matter of law, there is no verdict underlying the judgment, there will be no findings underlying the judgment, but there will be a ruling of your Honor that you have already indicated, and we have covered in the record it is your ruling as a matter of law on the only issue left open and not stipu-

lated to, and by consequence the judgment that will be [fol. 220] drawn will be a special form of judgment showing it was entered on a ruling as a matter of law on the one issue submitted.

The Court: That is correct. So you prepare the judgment and have it approved by Mr. Dunne and get it to me as soon as you can.

Mr. Downey: Yes, your Honor.

The Court: Court will stand adjourned, gentlemen.

[fol. 221] DEFENDANT'S EXHIBIT A

Southern Pacific Company,

Board of Directors,

August 17, 1950.

The President referred to the current freight car shortage, explaining the principal causes thereof and steps being taken by the nation's railroads to alleviate it, and stated that additional freight cars are urgently needed to handle commercial carloadings and increasing Government military shipments.

The President recommended approval of the acquisition of 5,000 units of freight train equipment, at a total cost presently estimated at $25,797,500, subject to usual escalator clauses to cover increase or decrease in cost of labor and materials, to meet System needs, with the understanding that arrangements to finance a substantial portion of the total cost would be submitted to this Board or the Executive Committee in due course for approval, viz.:

Number	Type	Assignment SPCo	Assignment T&NO	Estimated Unit Cost	Estimated Total Cost
3,000	Box	2,000	1,000	$5,100	$15,300,000
500	Automobile	500	.....	6,100	3,050,000
1,000	Gondola—General service	.....	1,000	4,300	4,300,000
100	Gondola—Mill type	100	.....	6,050	605,000
100	Open hopper—Hart selective	100	.....	5,800	580,000
250	Covered hopper	175	75	6,300	1,575,000
50	Caboose	50	.....	7,750	387,500
5,000		2,925	2,075	.....	$25,797,500

The President stated that it is proposed to construct the 500 automobile cars recommended in Company shops at Sacramento, and, if it is found practicable and economical to do so, to construct all or a portion of the 2,000 box cars recommended for Pacific Lines at Sacramento shops:

After discussion, and on motion duly made and seconded, it was unanimously

Resolved, That the President's recommendation be and it hereby is approved, and that the proper officers of this Company be and they hereby are authorized and directed to take such steps as may be necessary or proper to carry it into effect substantially as stated.

A True Copy.

Attest:

Theodore Wright, Assistant Secretary.

[fol. 222] DEFENDANT'S EXHIBIT B

Southern Pacific Equipment Company

Board of Directors

September 15, 1950

On motion, duly made and seconded, the following resolutions were adopted by unanimous vote:

Resolved: That this Company construct, in accordance with plans and specifications furnished or to be furnished by Southern Pacific Company, the following equipment, at a total estimated aggregate cost of $9,800,000.00:

Quantity	Type	Approx. Unit Price	Approx. Total Cost
500	50-Ton 40' 6" Box Cars 10' high, 9' 4" wide, with 7' doors	$5,080.00	$2,540,000.00
500	50-Ton 50' 6" Automobile Cars 10' 6" high, 9' 4½" wide with 15' doors but without Auto Loaders	6,100.00	3,050,000.00
1000	50-Ton Composite Gondola Cars	4,210.00	4,210,000.00
	Total		$9,800,000.00

Resolved Further: That the President and the Vice President of this Company be and they are hereby severally authorized, empowered and directed, in the name and on

behalf of this Company, to place orders for all necessary materials and supplies required for and entering into the construction of the aforesaid cars to be constructed by this Company, such orders to be placed with the Company or Companies presenting the bid most favorable to this Company, considering the lowest price or prices for the materials and supplies and the ability and reliability of the bidder or bidders, financially and otherwise, to deliver the property.

Resolved Further: That the President and Vice President of this Company be and they are hereby severally authorized, empowered and directed, in the name and on behalf of this Company, to negotiate, prepare, execute under the corporate seal of this Company and deliver all contracts and other instruments and to take all such other action as may be necessary to accomplish the purposes of these resolu-
[fol. 223] tions, prompt report to be made to this Board of all such contracts and other instruments so executed and delivered.

Certified a True Copy:

Roy G. Hillebrand, Secretary.

[fol. 224] DEFENDANT'S EXHIBIT C

Memorandum of Agreement made this 29th day of September, 1950, by and between Southern Pacific Equipment Company, a corporation of the State of California, First Party (hereinafter called the Equipment Company), and Southern Pacific Company, a corporation of the State of Delaware, Second Party (hereinafter called the Pacific Company).

Whereas, the Equipment Company desires to construct the following equipment in the shops of the ~~Pacific~~ Company at Sacramento, California, viz.:

500—50-Ton 50'6" Automobile Cars without Auto Loaders to be lettered S.P. and numbered 192500 to 192999, both inclusive.

500—50-Ton 40'6" Box Cars lettered S.P. and numbered 103600 to 104099 both inclusive.

1000—50-Ton Composite Gondola Cars lettered T.& N.O. and numbered 47000 to 47999 both inclusive.

Now, therefore, the parties hereto in consideration of the mutual covenants and agreements hereinafter contained agree as follows:

1. The Pacific Company agrees to furnish to the Equipment Company the use of the shops of the Pacific Company at Sacramento, California, including its shop machinery and tools therein, for the purpose of using the same in construction of said equipment.

2. The Equipment Company shall pay the Pacific Company a reasonable amount for maintenance and supervision of said shops and facilities.

3. Pacific Company shall provide the labor for the construction of said cars and Equipment Company shall reimburse Pacific Company for the cost of such labor to Pacific Company.

4. Equipment Company shall indemnify the Pacific Company and save it harmless from and against any and all claims, loss, damage, injury and liability howsoever the same may be caused, resulting directly or indirectly from the use of said shops and/or facilities by Equipment Company.

5. In case of a disagreement between the parties as to the true intent and meaning of any part of the arrangement herein provided for, the point or points in dispute shall be submitted to the arbitrament of three persons. The party demanding such reference shall give to the other party notice of such demand and nominate a person to act as one referee. If at the expiration of thirty days from the receipt of such notice the party receiving it has not notified the party demanding the reference of its nomination of a second referee, such second referee shall be appointed upon ten days' notice upon motion of the party making the demand by the judge of any court of the United States [fol. 225] within the State of California holding the senior commission, and in his absence by the judge holding the next oldest commission. The first and second referees shall select another disinterested and competent person and when the board is complete it shall fix the day and place for the hearing of which the parties shall be severally notified. If the first and second referees shall be unable to agree upon the other referee, such referee shall be appointed

upon ten days' notice upon motion of either party by the judge of any court of the United States within the State of California holding the senior commission and in his absence by the judge holding the next oldest commission. After hearing the testimony and arguments submitted by each party, the referees, or majority of them, if they agree upon an award, shall state it in writing, which when delivered to both parties, shall be binding and conclusive upon each, and each party hereby expressly agrees to be bound conclusively thereby.

The board of referees making any final award hereunder shall determine in its discretion by which of the parties the fees and expenses of the arbitration shall be paid or shall apportion such fees and expenses between the parties, and such fees and expenses shall be forthwith paid by the party or parties liable therefore in accordance with such adjudication of the referees. If either party shall refuse to keep and perform any award, the adverse party may enforce the same by apt proceedings in any court of law or equity. The books and papers of both parties, so far as they relate to any matters submitted to arbitration, shall be open to the examination of the arbitrators.

In Witness Whereof, the parties hereto have executed this instrument in Triplicate the day and year first above written.

Southern Pacific Equipment Company, by (Orig. Sgd.) Roy G. Hillebrand, Vice President. (Seal.)

Attest. (Orig. Sgd.) Chas. E. Eagan, Jr., Assistant Secretary.

Southern Pacific Company, by (Orig. Sgd.) J. W. Corbett, Vice President. (Seal.)

Attest: (Orig. Sgd.) Roy G. Hillebrand, Assistant Secretary.

Certified a true copy: Roy G. Hillebrand, Secretary, Southern Pacific Equipment Company.

[fol. 226] DEFENDANT'S EXHIBIT D

Memorandum of Agreement made this 1st day of July 1951 by and between Southern Pacific Equipment Company, a corporation of the State of California (hereafter called the "Builder"), party of the first part, and George Smith and H. J. Wylie (Hereinafter called the "Purchasers"), parties of the second part,

Witnesseth:

That the parties hereto, in consideration of the mutual covenants and agreements hereinafter contained, agree as follows, namely:

The Builder agrees to construct, or that it has constructed, in accordance with plans and specifications furnished or to be furnished by the Southern Pacific Company, and to sell and deliver to the parties of the second part the following equipment, viz:

380 50-ton composite tight bottom gondola cars, with wood sides and wood floors, lettered T.& N.O. and numbered 47528 to 47907, both inclusive.

Said cars shall be shipped and delivered to Purchasers at Luning or Sparks Nevada, Klamath Falls, Crescent Lake, Ashland or Eugene Oregon, as Purchasers may direct, by delivery by Builder to Southern Pacific Company, a carrier by railroad, for shipment to such points by such carrier under commercial bill of lading with freight paid in advance by Builder. Said cars shall be consigned to The Pennsylvania Company for Banking and Trusts, care of G.M. Betterton, agent for such company. It is distinctly understood and agreed that possession and title shall remain in Builder, notwithstanding delivery of said cars at origin to said carrier.

The Purchasers agree to purchase and pay for said equipment within thirty (30) days after the delivery thereof at destination, and the rendering of invoices therefore, respectively, the purchase price to be the actual cost thereof. Title to said equipment shall be reserved in the builder notwithstanding the delivery thereof, until payment therefor is made in full by the Purchasers or their assigns.

In Witness Whereof the parties hereto have executed this

instrument in sextuplicate the day and year first above written.

Southern Pacific Equipment Company, by (Orig. Sgd.) V. S. Andrus, President.

Attest: (Orig. Sgd.) Roy G. Hillebrand, Secretary.

[fol. 227] DEFENDANT'S EXHIBIT E

Know All Men by These Presents, That George Smith and H. J. Wylie (hereinafter called the Vendors) in consideration of the sum of One Dollar and other good and valuable considerations, the receipt of which is hereby acknowledged, hereby sell, assign, transfer and set over unto The Pennsylvania Company for Banking and Trusts, (hereinafter called the Trustee), as Trustee under an agreement, dated July 1, 1951, made by the Vendors with the Trustee and Southern Pacific Company, constituting Southern Pacific Company Equipment Trust, Series FF, in so far as it relates to the equipment described in the following contracts:

1. Contract dated March 23, 1951, between General Motors Corporation (Electro-Motive Division) and Southern Pacific Equipment Company, designated as Order No. P-1003, in so far as said contract relates to the construction of 14 Model F-7, 6,000 h.p. Diesel freight locomotives, each locomotive to consist of two (2) Model F-7, 1,500 h.p. "Lead" units and two (2) Model F-7, 1,500 h.p. "Booster" units, lettered S.P. and numbered; "Lead" units 6340 to 6367, both inclusive, and "Booster" units 8240 to 8267, both inclusive.

2. Contract dated September 15, 1950, between Pullman-Standard Car Manufacturing Company and Southern Pacific Equipment Company, designated as order No. P-3064, in so far as said contract relates to the construction of 570 50-ton, steel-sheathed wood-lined box cars, lettered T. & N.O. and numbered 60632 to 61291, both inclusive.

3. Contract between Southern Pacific Equipment Company and the Vendors for the following:

380 50-ton composite tight bottom gondola cars, with wood sides and wood floors, lettered T. & N.O. and numbered 47528 to 47907, both inclusive.

Together with all and singular the said equipment manufactured or to be manufactured, under and in accordance with the provisions of the said contracts, or any of them, and numbered and described as hereinbefore set forth, and all right, title and interest now owned or hereafter acquired by the Vendors, or either of them, in and to the said equipment and in and to the said contracts in so far as said contracts relate to said equipment.

To have and to hold all and singular, the equipment hereby assigned and the contracts to the Trustee, its successors and assigns, for its and their own use and behoof, forever.

And the Vendors hereby covenant with the Trustee, its successors and assigns, that the Vendors have not done, committed, executed or suffered any act, matter or thing whatsoever, whereby the said contracts in so far as said contracts relate to said equipment, or the said equipment now are, or at any time hereafter shall or may be impeached, charged or encumbered in any manner or any way whatsoever.

In Witness Whereof, the Vendors have hereunto set their hands and seals this 9th day of July, 1951.

(Orig. Sgd.) George Smith, (Orig. Sgd.) H. J. Wylie.

Witness: (Orig. Sgd.) Robert McLean, (Orig. Sgd.) John Hutchison.

(Here follows 1 Photolithograph, side folio 228)

9-30-500

Defendant's Exhibit F

BILL COLLECTIBLE

8-130-A

Bill No. 3866

Quote above number when remitting

Month's Account JULY 1951

Dept. No. 150

Date Made July 31, 1951

To SOUTHERN PACIFIC EQUIPMENT COMPANY, Dr.

The Pennsylvania Company for Banking and Trusts, Trustee, under Southern Pacific Company Equipment Trust Series "FF"

DEFENDANT'S EXHIBIT F

For estimated cost of three hundred sixty-nine (369) Gondola Cars, lettered T.&N.O. and numbered 47528 to 47896, both inclusive. 369 cars at $4,470.49 per car	$1,649,610.81

THE UNDERSIGNED, General Auditor of Southern Pacific Equipment Company, hereby certifies that the cost of equipment as herein set forth is not less than the amount herein specified and this bill is approved for collection. The undersigned further certifies that proper markings have been applied to the above numbered gondola cars reading "Southern Pacific Company Equipment Trust, Series FF, The Pennsylvania Company for Banking and Trusts, Trustee, Owner and Lessor," in accordance with provisions of Article Third of the Lease of Railroad Equipment, dated July 1, 1951 between the Pennsylvania Company for Banking and Trusts and Southern Pacific Company.

[fol. 229] DEFENDANT'S EXHIBIT G

Know all Men by these Presents:

That, Southern Pacific Equipment Company (hereinafter called the "Manufacturer"), in consideration of One Dollar to it in hand paid by The Pennsylvania Company for Banking and Trusts, of Philadelphia, as Trustee under Agreement dated July 1, 1951, made by George Smith and H. J. Wylie, with said The Pennsylvania Company for Banking and Trusts and Southern Pacific Company, and for other good and valuable considerations, the receipt of which is hereby acknowledged, does hereby convey, sell, transfer and deliver unto said The Pennsylvania Company for Banking and Trusts, as such Trustee (hereinafter called the "Trustee"), and to its successors and assigns, the following described equipment, to wit:

Three hundred sixty-nine (369) 50-Ton Composite Tight Bottom Gondola Cars, lettered T. & N. O. and numbered 47588 to 47896, both inclusive, being certain equipment constructed by the Manufacturer under contract dated July 1, 1951, between the Manufacturer and George Smith and H. J. Wylie.

To have and to hold all and singular the said equipment to the Trustee, its successors and assigns, for its and their own use and behoof forever.

And the Manufacturer hereby covenants with the Trustee, its successors and assigns, that the Manufacturer is the lawful owner of said equipment; that such equipment is free from all liens and encumbrances; that the Manufacturer has good right to sell the same as aforesaid, and that the Manufacturer will warrant and defend the same against the lawful claims and demands of all persons.

In Witness Whereof, Southern Pacific Equipment Company has caused this instrument to be signed by its Vice President, and its corporate seal to be hereunto affixed and attested by its General Auditor this 31st day of July, 1951.

(In duplicate)

(Seal) Southern Pacific Equipment Company
(Signed) By Roy G. Hillebrand,
Vice President.

Attest: Original signed, P. J. Kendall, General Auditor.

[fol. 230] DEFENDANT'S EXHIBIT H

Southern Pacific Company Equipment Trust

Series FF

Equipment Trust Certificates

Lease of Railroad Equipment

Dated as of July 1, 1951

The Pennsylvania Company for Banking and Trusts

to

Southern Pacific Company

Agreement

Dated as of July 1, 1951

George Smith and H. J. Wylie, Vendors

with

The Pennsylvania Company for Banking and Trusts

and

Southern Pacific Company

[fol. 231] Lease of Railroad Equipment, dated as of the first day of July, 1951, between The Pennsylvania Company for Banking and Trusts, a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania, Trustee as hereinafter mentioned (hereinafter called the Trustee), party of the first part, and Southern Pacific Company, a corporation duly organized and existing under the laws of the State of Delaware (hereinafter called the Company), party of the second part:

Whereas, by a certain Agreement, bearing date as of the first day of July, 1951, between George Smith and H. J. Wylie, Vendors, the Trustee and the Company (hereinafter called the Agreement), a counterpart origi-

nal whereof is hereto annexed and made a part hereof, there was constituted the "Southern Pacific Company Equipment Trust, Series FF," under which the railroad equipment which said Vendors transfer or cause to be transferred thereunder to the Trustee is to be leased hereunder by the Trustee to the Company; and

Whereas, pursuant to the provisions of the Agreement, the railroad equipment hereinafter described or referred to has been or will be transferred to the Trustee thereunder, and the title thereto vested in the Trustee:

Now, therefore, this Agreement witnesseth:

That The Pennsylvania Company for Banking and Trusts, Trustee as aforesaid (acting in pursuance of the Agreement), party of the first part, for and in consideration as well of the sum of one dollar to it paid by Southern Pacific Company, party of the second part, at or before the ensealing and delivery hereof, the receipt of which is hereby acknowledged, as of the rents and covenants here-[fol. 232] inafter mentioned to be paid, kept and performed by the Company, has let and leased, and does hereby let and lease, to the Company all the following new standard-gauge railroad equipment of the Southern Pacific Company Equipment Trust, Series FF, to-wit:

Number of Units	*General Description*	*Estimated Average Cost Per Locomotive or Car*
14	Model F-7, 6,000 h.p. Diesel freight locomotives, each locomotive to consist of two (2) Model F-7, 1,500 h.p. "Lead" units and two (2) Model F-7, 1,500 h.p. "Booster" units, General Motors Corporation (Electro-Motive Division), builder; lettered S.P. and numbered as follows: "Lead" units numbered 6340 to 6367, both inclusive, and "Booster" units numbered 8240 to 8267, both inclusive	$663,169.00

Nnmber of Units	*General Description*	*Estimated Average Cost Per Locomotive or Car*
570	50-ton steel-sheathed wood-lined box cars, Pullman-Standard Car Manufacturing Company, builder; lettered T. & N. O. and numbered 60632 to 61201, both inclusive	5,333.46
380	50-ton composite tight bottom gondola cars with wood sides and wood floors, Southern Pacific Equipment Company, builder; lettered T. & N. O. and numbered 47528 to 47907, both inclusive	4,470.49
	Estimated total cost : $14,023,224.40	

or so much thereof as may be transferred and delivered to the Trustee pursuant to the Agreement, together with such other railroad equipment as shall be acquired for said trust in substitution for any of the equipment above [fol. 233] specifically described, or in addition thereto or replacement thereof, and subjected to this Lease as herein provided (all hereinafter and in the Agreement collectively, unless the context shall otherwise indicate, called the Trust Equipment).

In the event that the Vendors shall, as provided in Section 1 of Article I of the Agreement, acquire other new standard-gauge railroad equipment, other than work equipment, in substitution for any portion or portions of the railroad equipment above specifically described, such other new standard-gauge railroad equipment, by a supplemental lease or leases, shall be included as part of the Trust Equipment and shall be subject to all the terms and conditions of this Lease and of the Agreement in all respects as though it had been part of the Trust Equipment hereinabove described, and the equipment for which the substituted Trust Equipment is substituted shall be eliminated from the Trust Equipment.

In case the lower of (a) the aggregate estimated cost

and (b) the aggregate actual cost of so much of the railroad equipment hereinabove specifically described and substituted equipment, if any, as shall be acquired for said trust shall not amount to at least $14,000,000, then, in addition thereto, there will be acquired as provided in the Agreement and subjected to this Lease other new standard-gauge railroad equipment, other than work equipment, of such cost that the lower of the aggregate estimated cost and the aggregate actual cost of such specifically described, substituted and additional equipment will be at least $14,000,000; and the Trustee shall execute to the Company a supplemental lease of such additional equipment, describing the same, upon and subject to all the terms and conditions hereof and of the Agreement, and such additional equipment shall be part of the Trust Equipment, subject to all of the terms and conditions of this Lease and of the Agreement in all respects as though [fol. 234] it had been part of the specifically described equipment.

As and when the Trust Equipment shall from time to time be transferred and delivered to the Trustee under the Agreement and marked in accordance with the provisions of Article Third hereof, the same shall be delivered to the Company, and shall upon such delivery to the Company *ipso facto* and without further deed of lease or transfer pass under and become subject to all the terms and provisions of this Lease, and be deemed a portion of the Trust Equipment leased hereunder by the Trustee to the Company in all respects as if the same had been so delivered simultaneously with the execution and delivery hereof.

And the Company, in consideration of the premises, by these presents covenants and agrees with the Trustee as follows:

First. The Company hereby accepts (subject to the conditions mentioned in the Agreement) this Lease of all the Trust Equipment and hereby covenants and agrees to accept hereunder delivery and possession of the Trust Equipment as hereinbefore provided; and the Company covenants and agrees to pay to the Trustee, its successors or assigns (or in the case of taxes to the proper taxing

authority), rent hereunder which shall be sufficient to pay and discharge the following items, when and as the same shall become due and payable:

(*a*) From time to time, as and when any part of the Trust Equipment shall be delivered to the Company, amounts in cash equal to the difference between the cost of the part of the Trust Equipment so delivered, as certified to the Trustee by the President, a Vice President or the Controller of the Company, and the amount of Deposited Cash (as defined in Section 3 of Article I of the Agreement) payable in respect thereof as provided in said Section 3 of said [fol. 235] Article I, provided that the aggregate of all amounts so paid to the Trustee shall never be less than 25% of the cost of all the Trust Equipment which shall then and theretofore have been delivered hereunder.

(*b*) The necessary and reasonable expenses of the trust, including all expenses connected with the Trust Equipment and this Lease thereof, and the sums required to restore to Deposited Cash an amount equal to any expenses incurred or sustained by the Trustee in connection with any purchase or sale of Government Securities (as defined in Section 9 of Article V of the Agreement) and also an amount equal to any loss of principal incident to the sale of any Government Securities for a sum less than the amount paid therefor out of Deposited Cash, including accrued interest.

(*c*) Any and all taxes, assessments and governmental charges upon the income or property of the trust, or the agreements evidencing the same, which the Trustee under the Agreement may be required to pay, but excluding any and all taxes, assessments and governmental charges which the Company or the Trustee may be required to pay or to retain from the principal of the Trust Certificates issued as provided in the Agreement, herein called the Trust Certificates, or from the dividends thereon, under any present or future law of the United States of America

or of any state, county, municipality or other taxing authority therein.

(*d*) The dividend warrants attached to the Trust Certificates when and as the same shall become payable, and in the case of the issue of temporary certificates without dividend warrants, the dividends payable thereon; also, to the extent legally enforceable, interest at the dividend warrant rate, from the due date, upon the amount of any installments of rental payable under this subdivision (*d*) and the following subdivision (*e*) which shall not be paid when due.

[fol. 236] (*e*) The principal of the Trust Certificates when and as the same shall become payable, whether by declaration or upon the respective dates of maturity thereof, to wit:

Maturity	*Amount*
July 1, 1952	$ 700,000
July 1, 1953	700,000
July 1, 1954	700,000
July 1, 1955	700,000
July 1, 1956	700,000
July 1, 1957	700,000
July 1, 1958	700,000
July 1, 1959	700,000
July 1, 1960	700,000
July 1, 1961	700,000
July 1, 1962	700,000
July 1, 1963	700,000
July 1, 1964	700,000
July 1, 1965	700,000
July 1, 1966	700,000
Total	$10,500,000

The Company shall not be required, however, to pay any tax, assessment or governmental charge so long as the Company shall in good faith and by appropriate legal proceedings contest the validity thereof, unless thereby, in the judgment of the Trustee, the rights or interests of the Trustee or of the Trust Certificate holders may be materially endangered.

Second. This Lease shall continue in force until the rent so paid hereunder shall furnish moneys sufficient to meet, discharge and cancel all the interests in the Southern Pacific Company Equipment Trust, Series FF, created in respect of the Trust Equipment, and the dividends thereon, as well as the other payments and charges aforesaid. At the termination of this Lease and after all such payments [fol. 237] shall have been completed and fully made, the Trust Equipment shall be assigned and transferred by the Trustee to the Company or its nominee or nominees, and shall be and become the absolute property of the Company or its nominee or nominees; provided, however, and it is agreed, that until then the title to none of the Trust Equipment shall pass to or vest in the Company, but title to and ownership of all the Trust Equipment shall be reserved to and remain in the Trustee, notwithstanding the delivery of the Trust Equipment to and the possession and use thereof by the Company.

Third. At or before the delivery to the Company of each unit of the Trust Equipment, there shall be plainly, distinctly, permanently and conspicuously placed and fastened upon each side of each thereof a metal plate bearing the following words, or such words shall be otherwise plainly, distinctly, permanently and conspicuously marked on each side of each thereof, in either case with appropriate changes thereof or additions thereto as from time to time may be required by law in order to protect the interest of the Trustee, in letters not less than one inch in size:

"Southern Pacific Company Equipment Trust, Series FF, The Pennsylvania Company for Banking and Trusts, Trustee, Owner and Lessor."

Such plates or marks shall be such as to be readily visible and as to indicate plainly the Trustee's ownership of said unit of Trust Equipment. In case, during the continuance of this Lease, any of such plates or marks shall at any time be removed, defaced or destroyed, the Company will immediately cause the same to be restored or replaced. The Company will not change, or permit to be changed, the letters or numbers upon the Trust Equipment (nor any letters or numbers which may be substituted as herein provided), except in accordance with a statement of new letters [fol. 238] or numbers to be substituted therefor, which shall

previously have been filed with the Trustee by the Company.

The Company, during the continuance of this Lease, will not allow the name of any person, association or corporation to be placed on any of the Trust Equipment as a designation which might be interpreted as a claim of ownership thereof by the Company or by any person, association or corporation other than the Trustee, but the Trust Equipment may be lettered "Southern Pacific Company," "Southern Pacific System," "Southern Pacific Lines," "Southern Pacific," "S. P. Co.," "S. P.," or with the name or initials of its subsidiary, Texas and New Orleans Railroad Company, *i. e.*, "Texas and New Orleans Railroad Company," "T. & N. O. R. R. Co.," "T. & N. O.," or with the name or initials of any other subsidiary railroad company which is permitted to use such equipment as hereinafter in Article Seventh hereof provided, or in some other appropriate manner, for convenience of identification.

Fourth. (*a*) The Company, during the continuance of this Lease, will maintain and keep the Trust Equipment in good order and repair, at its own proper cost and charge; and will replace, at its own cost, any of the Trust Equipment that may be worn out, lost or destroyed, by other standard-gauge railroad equipment, other than work equipment, free from liens, of equal value, which shall have been built after June 30, 1951. The value of the railroad equipment procured for such replacement shall be figured at cost if that be below market value, or at market value if that be below cost, but such value shall in no event be deemed to exceed the original actual cost thereof less depreciation at the rate of one-third of one per cent. for each calendar month of prior use. The value of any of the Trust Equipment worn out, lost or destroyed shall be the original actual cost thereof less depreciation accruing upon [fol. 239] such equipment, provided, however, such depreciation shall not exceed an amount computed by the straight-line method at a rate not greater than one-third of one per cent. of the cost of such Trust Equipment for each calendar month between the date of delivery of such Trust Equipment to the agent of the Trustee and the time when such Trust Equipment became worn out, lost or destroyed.

The Company may, at its option, with the consent of the Trustee, and in lieu of such immediate replacement of worn out, lost or destroyed Trust Equipment, deposit with the Trustee cash equal to the value, determined as above provided, of such Trust Equipment. In the event that deposits in cash are made in lieu of immediate replacement, the sums so deposited shall be held by the Trustee for the equal and proportionate benefit of the bearers and registered holders of the Trust Certificates and dividend warrants until the Trust Equipment so worn out, lost or destroyed shall have been replaced as above provided, at which time the sums so deposited shall be paid to the Company. At the time of every such replacement or of such deposit in cash in lieu of immediate replacement, the Company shall deliver to the Trustee a certificate of the President, a Vice President or the Controller of the Company stating the original actual cost and the value of the Trust Equipment so worn out, lost or destroyed, determined as above provided. At the time of every such replacement, the title to all railroad equipment procured for such replacement shall be taken in the name of the Trustee, free from liens, shall immediately become part of the Trust Equipment, subject to all the terms and conditions hereof and of the Agreement in all respects as though it had been part of the original Trust Equipment, shall be marked as provided in Article Third above and appropriately numbered, and the Company shall further deliver to the Trustee a certificate of the President, a Vice President or the Controller [fol. 240] of the Company stating the date of construction, the original actual cost, less depreciation, if any, determined as above provided, and the reasonable market value of the railroad equipment procured for replacement, and in addition the Company shall furnish the Trustee with a bill of sale or bills of sale of such replacing equipment from the manufacturers or owners to the Trustee and a certificate as to delivery in like manner as provided in Section 4 of Article I of the Agreement, together with an opinion of counsel (who may be counsel to the Company) satisfactory to the Trustee that such bill or bills of sale are valid and effective, either alone or in connection with other described instruments delivered to the Trustee, to vest in the Trustee,

free from all liens and encumbrances, the title so transferred to the Trustee.

(*b*) The Company covenants and agrees to furnish to the Trustee, whenever required by the Trustee, and at least once in every year during the continuance of this Lease, an accurate statement of the amount, description and numbers of the Trust Equipment then covered hereby, the amount, description and numbers of all that may have been worn out, lost or destroyed by accident or otherwise and the number of units thereof then undergoing repairs and in the shops for repairs. Together with said statement the Company shall also furnish to the Trustee a statement signed by its President, a Vice President or its Superintendent of Motive Power, stating that in the case of all of the Trust Equipment repainted during the preceding year, the marking required by Article Third hereof has been preserved, or that the same when repainted has been again marked as required by said Article. And the Trustee shall have the right, by its agents, to inspect the Trust Equipment, at the then existing locations thereof, once in every year during the continuance of this Lease.

[fol. 241] (*c*) The Company covenants and agrees to indemnify and protect the Trustee in the use of any and all patented inventions employed in and about the Trust Equipment and to comply in all respects with the laws of the United States and of all the states in which the Trust Equipment or any thereof may be operated and with all lawful acts, rules, regulations and orders of the Interstate Commerce Commission and of all other commissions, boards and other legislative, executive, administrative or judicial bodies or officers having power to regulate or supervise any of the Trust Equipment, including all lawful acts, rules, regulations and orders of any body having competent jurisdiction relating to automatic coupler devices or attachments, air brakes and other appliances; provided, however, that the Company may in good faith contest the validity of any such law, act, rule, regulation or order, or the application thereof to the Trust Equipment or any part thereof, in any reasonable manner which will not, in the judgment of the Trustee, materially endanger the rights or interests of the Trustee or of the holders of the Trust Certificates.

Fifth. Upon the written request of the Company, stat-

ing that the use of any of the Trust Equipment is no longer required by the Company, evidenced by resolution of its Board of Directors or Executive Committee, the Trustee shall, while the Company is not in default hereunder, execute and deliver a bill of sale assigning and transferring to the purchaser named by the Company the absolute title to such Trust Equipment; provided, however, that none of the Trust Equipment shall be so assigned or transferred, unless simultaneously the Trustee shall receive from said purchaser the agreed purchase price thereof and from the Company a sum in cash equal to the amount, if any, by which said purchase price is less than the fair value of the equipment sold as in good repair at the time of sale. For [fol. 242] this purpose the fair value of the sold equipment as in good repair shall be considered to be the original cost thereof less one-third of one per cent of the said original cost for each calendar month between the date of delivery of such Trust Equipment to the agent of the Trustee and the time of delivery by the Company to the purchaser thereof. The sums so paid to the Trustee shall be held by it for the equal and proportionate benefit of the bearers and registered holders of the Trust Certificates and dividend warrants, until paid out by the Trustee upon the written request of the Company for the acquisition of other standard-gauge railroad equipment, other than work equipment, free from liens, of equal value, which shall have been built after June 30, 1951. The value of the railroad equipment so acquired shall be figured at cost if that be below market value, or at market value if that be below cost, but such value shall in no event be deemed to exceed the original actual cost thereof less depreciation at the rate of one-third of one per cent for each calendar month of prior use. At the time of every such transfer of equipment no longer required, the Company shall deliver to the Trustee a certificate of the President, a Vice President or the Controller of the Company stating the original actual cost and the value of the Trust Equipment no longer required, determined as above provided. At the time of every such acquisition of other equipment, the title to all railroad equipment so acquired shall be taken in the name of the Trustee, free from liens, shall immediately become part of the Trust Equipment, subject to all of the terms and

conditions hereof and of the Agreement in all respects as though it had been part of the original Trust Equipment, shall be marked as provided in Article Third above and appropriately numbered, and the Company shall further deliver to the Trustee a certificate of the President, a Vice President or the Controller of the Company stating [fol. 243] the date of construction, the original actual cost, less depreciation, if any, determined as above provided, and the reasonable market value of the railroad equipment so acquired, and, in addition, the Company shall furnish the Trustee with a bill of sale or bills of sale of such equipment so acquired from the manufacturers or owners to the Trustee and a certificate as to delivery in like manner as provided in Section 4 of Article I of the Agreement, together with an opinion of counsel (who may be counsel to the Company) satisfactory to the Trustee that such bill or bills of sale are valid and effective either alone or in connection with other described instruments delivered to the Trustee, to vest in the Trustee, free from all liens and encumbrances, the title so transferred to the Trustee.

The Trustee may accept any certificate executed by the President, a Vice President, the Controller or the Superintendent of Motive Power of the Company or any opinion of counsel rendered pursuant to the provisions of Article Fourth hereof and this Article Fifth as conclusive evidence of the matters therein stated and shall incur no liability for any act done under said Articles in reliance thereon.

Sixth. In case the Company

(1) shall make default in the payment of any part of the rent provided by this Lease, and such default shall continue for more than 30 days after the same shall become due and payable, or

(2) shall make or suffer any unauthorized assignment or transfer of its rights or interests in, or any unauthorized sublease of, or, except as herein authorized, part with the possession of the Trust Equipment or any part thereof, and (except in the case of an unauthorized assignment arising from the appointment of a receiver or receivers in equity or a trustee or trus- [fol. 244] tees in bankruptcy for the Company or its

THE UNDERSIGNED, General Auditor of Southern Pacific Equipment Company, hereby certifies that the cost of equipment as herein set forth is not less than the amount herein specified and this bill is approved for collection. The undersigned further certifies that proper markings have been applied to the above numbered gondola cars reading "Southern Pacific Company Equipment Trust, Series FF, The Pennsylvania Company for Banking and Trusts, Trustee, Owner and Lessor," in accordance with provisions of Article Third of the Lease of Railroad Equipment, dated July 1, 1951 between the Pennsylvania Company for Banking and Trusts and Southern Pacific Company.

X ORIGINAL SIGNED
P. J. KENDALL

General Auditor

It is understood and agreed that title to the equipment herein described should not pass to the purchaser until final payment therefor has been made in full.

U. S. N. AUG 9 1951

DISTRIBUTION:

778-L-51 Estimated Cost of Series "FF" Equipment Sold $1,649,610.81

CORRECT:

APPROVED:

EXAMINED AND FOUND CORRECT:

APPROVED FOR REGISTRY AND COLLECTION
AUG 8 1951

For Assistant General Auditor

property) the Company shall fail or refuse either to cause any such assignment or transfer or sublease to be cancelled by agreement of all parties having any interest therein and recover possession of such Trust Equipment, within 30 days after the Trustee shall have demanded in writing such cancellation and recovery of possession, or within said 30 days to deposit with the Trustee a sum in cash equal to the original cost of the Trust Equipment so assigned or transferred or subleased or the possession of which shall have been parted with otherwise than as herein authorized, as certified to the Trustee by the President, a Vice President or the Controller of the Company (any sum so deposited to be returned to the Company upon the cancellation of such assignment, transfer or sublease and the recovery of possession by the Company of such Trust Equipment), or

(3) shall, for more than 90 days after the Trustee shall have demanded in writing performance thereof, fail or refuse to comply with any other of the terms and covenants herein or in the Agreement on its part to be kept and performed, or to make provision satisfactory to the Trustee for such compliance,

then, in any such case (herein and in the Agreement sometimes called events of default), the Trustee at its option may, by its agents enter upon the railroads and premises of the Company and take possession of all or any part of the Trust Equipment, and withdraw the same from said railroads and premises, retaining all payments which up to that time may have been made on account of rental for the Trust Equipment and otherwise, and lease the Trust Equipment or any part thereof, or sell the same or any part thereof, so far as may be necessary to perform and fulfill the trusts under the Agreement, at public or private sale, for cash or upon credit, [fol. 245] in its discretion, and otherwise proceed to enforce its rights and the rights of the owners of interests under the Agreement and under this Lease in the manner therein and herein provided; and upon such taking possession or withdrawal or lease or sale of the Trust Equipment, the Company shall cease to have any rights or remedies in respect of the Trust Equipment under this Lease, but all such

rights and remedies shall be deemed thenceforth to have been waived and surrendered by the Company; and no payments theretofore made by the Company for the rent or use of the Trust Equipment, or any of it, shall, in case of the happening of any such event of default and such taking possession, withdrawal, lease or sale by the Trustee, give to the Company any legal or equitable interest or title in or to the Trust Equipment, or any of it, or any cause or right of action, at law or in equity, in respect of the Trust Equipment against the Trustee or the owners of interests in the Southern Pacific Company Equipment Trust, Series FF, and such taking possession or withdrawal or lease or sale of the Trust Equipment by the Trustee shall not be a bar to recovery by the Trustee from the Company for rentals then or thereafter due and payable, and the Company shall be and remain liable for the same, until such sum shall have been realized as with the proceeds of the lease or sale of the Trust Equipment shall be sufficient for the discharge and payment in full of all the various items mentioned in subdivisions (*a*), (*b*), (*c*), (*d*) and (*e*) of Article First hereof, whether they shall have them matured or not.

In case the Trustee shall rightfully demand possession of the Trust Equipment in pursuance of this Lease, and shall reasonably designate a point or points upon the railroad of the Company, or upon the railroad of any company a majority of the capital stock of which is at the time directly or indirectly owned by the Company, for the delivery [fol. 246] of the Trust Equipment to it, the Company will, at its own expense, forthwith and in the usual manner and at the usual speed of freight trains, cause the Trust Equipment to be drawn to such point or points on said railroads as shall be designated by the Trustee and will there deliver or cause to be delivered the same to the Trustee, or at the option of the Trustee, it will keep the Trust Equipment on any of the lines of railroad or premises of the Company until the Trustee shall have leased, sold or otherwise have disposed of the same, and for such purpose the Company agrees to furnish without charge for rent or storage the necessary tracks at any convenient point or points selected by the Trustee. It is hereby expressly covenanted and agreed that the performance of this covenant is of the

essence of this Lease and that upon application to any court having jurisdiction in the premises the Trustee shall be entitled to a decree against the Company requiring the specific performance thereof.

The remedies in this Lease and in the Agreement provided in favor of the Trustee and the holders of Trust Certificates, or any of them, shall not be deemed exclusive, but shall be cumulative, and shall be in addition to all other remedies in their favor existing at law or in equity.

Seventh. The Company, so long as it shall not be in default under this Lease, shall be entitled to the possession of the Trust Equipment and the use thereof upon its lines of railroad and upon those of any railroad company a majority of the capital stock of which is at the time directly or indirectly owned by the Company, and upon connecting and other railroads in the usual interchange of traffic (including interchange of passenger train equipment in the operation of through or continuous lines of passenger service), from and after the delivery of the Trust Equipment by the Trustee to the Company, but only upon and subject [fol. 247] to all the terms and conditions of this Lease, and may permit the Trust Equipment or any part thereof to be so used by any railroad company a majority of the capital stock of which is so owned by the Company, and may receive compensation for such use from the company so using any part of the Trust Equipment; provided, however, that the right to such use shall be subject to all the terms and conditions of this Lease.

The Company will not either assign or transfer this Lease, or, subject to the foregoing provisions of this Article, transfer or sublet the Trust Equipment or any part thereof, without the written consent of the Trustee first had and obtained; and the Company shall not, without such written consent, except as hereinbefore provided, part with the possession of, or suffer or allow to pass out of its possession or control, any of the Trust Equipment. An assignment or transfer to a corporation which shall acquire all or substantially all of the lines of railroad of the Company and which, by execution of an appropriate instrument satisfactory to the Trustee, shall assume and agree to perform each and all of the obligations and covenants of the Com-

pany hereunder and under the Agreement and under the guaranty provided for in the Agreement shall not be deemed a breach of this covenant. The appointment of a receiver or receivers in equity or a trustee or trustees in bankruptcy for the Company or for its property shall not be deemed an unauthorized assignment by the Company of its rights and interests in the Trust Equipment and shall not be deemed a breach of this covenant, if, within 30 days after the Trustee shall have demanded in writing that action be taken in respect thereof, either (a) any such receiver or receivers or trustee or trustees shall be discharged, or (b) such receiver or receivers or trustee or trustees shall adopt [fol. 248] and assume and agree to perform each and all of the obligations and covenants of the Company hereunder and under the Agreement and under the guaranty provided for in the Agreement. The Trustee shall have the right to declare this Lease terminated in case an event of default shall happen through any unauthorized assignment or transfer of this Lease or unauthorized transfer or sublease of the Trust Equipment. The election of the Trustee to terminate this Lease under this clause shall have the same effect as the retaking of the Trust Equipment by the Trustee as hereinabove provided.

Eighth. This Lease may be simultaneously executed in several counterparts, each of which so executed shall be deemed to be an orignal, and such counterparts together shall constitute but one and the same instrument.

The Pennsylvania Company for Banking and Trusts, Trustee, does hereby constitute and apopint Wm. M. David to be its attorney, for it and in its name and as and for its corporate act and deed to acknowledge this Lease, before any person having authority by the laws of the Commonwealth of Pennsylvania or elsewhere to take such acknowledgment, to the intent that the same may be duly recorded.

Southern Pacific Company does hereby constitute and appoint R. E. Plummer to be its attorney, for it and in its name and as and for its corporate act and deed to acknowledge this Lease, before any person having authority by the laws of the Commonwealth of Pennsylvania or elsewhere to take such acknowledgment, to the intent that the same may be duly recorded.

In witness whereof, the Trustee, acting in accordance with the terms and conditions of the Agreement, and the Company, pursuant to due corporate authority, have caused these presents to be signed in their respective corporate [fol. 249] names and their respective corporate seals to be hereunto affixed, duly attested, as of the day and year first above written.

The Pennsylvania Company for Banking and Trusts, Trustee, by Wm. M. David, Vice President. (Corporate Seal.)

Attest: J. W. Thorn, Assistant Secretary.

Signed, sealed and delivered by The Pennsylvania Company for Banking and Trusts in the presence of: A. R. Olson, H. Nelson.

Southern Pacific Company, by R. E. Plummer, Vice President. (Corporate Seal.)

Attest: C. P. Feighery, Assistant Secretary.

Signed, sealed and delivered by Southern Pacific Company in the presence of: C. J. Huhn, F. H. Coyne, Jr.

[fol. 250] State of New York,
County of New York, ss:

Be it remembered, and I do hereby certify that on this 9th day of July, A. D. 1951, before me, Robert Joseph McLean, the undersigned officer, a Notary Public, duly commissioned and sworn in and for the State and County aforesaid, personally came and appeared Wm. M. David, a Vice President, and J. W. Thorn, an Assistant Secretary, of The Pennsylvania Company for Banking and Trusts, a corporation incorporated and existing under and by the laws of the Commonwealth of Pennsylvania and one of the corporations a party to, described in, and which executed the above, within and foregoing instrument, who are known to me to be a Vice President and an Assistant Secretary, respectively, of said Corporation, and who are to me personally known and personally known to me to be the same persons whose names are subscribed to said instrument, and who executed said instrument, as such Vice President and Assistant Secretary,

respectively, on behalf of said Corporation therein named and who acknowledged themselves to be a Vice President and an Assistant Secretary, respectively, of said Corporation and who acknowledged to me that said Corporation executed said instrument and that they as such Vice President and Assistant Secretary, respectively, being informed of the contents of said instrument and duly authorized so to do, executed, signed, sealed with the corporate seal, and delivered said instrument on behalf of and for and as the act of said Corporation by signing the name of the Corporation by themselves as such officers, respectively, as the free and voluntary act and deed of said Corporation and as their own free and voluntary act and deed, for the uses, purposes and considerations therein set forth, expressed and contained.

And at the same time the said Wm. M. David and J. W. Thorn, being by me duly sworn according to law, did each for himself and upon his oath depose, acknowledge and say that he, said Wm. M. David, resides at 42 West School Lane, Philadelphia 44, Pennsylvania, and is a Vice President, and he, said J. W. Thorn, resides at Waterloo Road, R. F. D., Berwyn, Pennsylvania, and is an Assistant Secretary, of said The Pennsylvania Company for Banking and Trusts, one of the corporations described in and which executed the above instrument; that he knows and is acquainted with the seal of said Corporation; that the seal affixed to said instrument is such corporate seal of said Corporation; and that said instrument was signed, sealed, executed and delivered in behalf of said Corporation by resolution, order and authority of the Board of Directors of said Corporation, and that he signed his name thereto by like order; that the signatures to said instrument were made by officers of said Corporation as indicated after said signatures and that said signatures are in their own proper handwriting, and that the said Corporation executed the said instrument freely [fol. 251] and voluntarily and for the uses and purposes therein mentioned; and said Wm. M. David and J. W. Thorn acknowledged to me said instrument to be the free and voluntary act and deed of said Corporation and that said Corporation executed the same.

And at the same time before me, the subscriber, per-

sonally appeared Wm. M. David, one of the attorneys named in the foregoing instrument, and by virtue and in pursuance of the authority therein conferred upon him acknowledged the said instrument to be the act and deed of said The Pennsylvania Company for Banking and Trusts.

Given under, and in witness and faith whereof I have hereunto set, my hand and official seal the day and year first above written.

My commission as notary public will expire March 30, 1952.

I am not a stockholder, director or officer of or in The Pennsylvania Company for Banking and Trusts.

Robert Joseph McLean, Notary Public, State of New York, No. 60-7836400, Qualified in Westchester County, Certificates filed with New York, Kings and Bronx Co. Clks. & Reg., Commission expires March 30, 1952. (Notarial Seal.)

[fol. 252] State of New York,
County of New York, ss:

Be it remembered, and I do hereby certify that on this 9th day of July, A. D. 1951, before me, Robert Joseph McLean, the undersigned officer, a Notary Public, duly commissioned and sworn in and for the State and County aforesaid, personally came and appeared R. E. Plummer, a Vice President, and C. P. Feighery, an Assistant Secretary, of Southern Pacific Company, a corporation incorporated and existing under and by the laws of the State of Delaware and one of the corporations a party to, described in, and which executed the above, within and foregoing instrument, who are known to me to be a Vice President and an Assistant Secretary, respectively, of said Corporation, and who are to me personally known and personally known to me to be the same persons whose names are subscribed to said instrument, and who executed said instrument, as such Vice President and Assistant Secretary, respectively, on behalf of said Corporation therein named and who acknowledged themselves to be a Vice President and an Assistant Secretary, respectively, of said Corporation and who acknowledged to me that said Corporation executed said instrument and that they as such Vice President and Assistant Secre-

tary, respectively, being informed of the contents of said instrument and duly authorized so to do, executed, signed, sealed with the corporate seal, and delivered said instrument on behalf of and for and as the act of said Corporation by signing the name of the Corporation by themselves as such officers, respectively, as the free and voluntary act and deed of said Corporation and as their own free and voluntary act and deed, for the uses, purposes and considerations therein set forth, expressed and contained.

And at the same time the said R. E. Plummer and C. P. Feighery, being by me duly sworn according to law, did each for himself and upon his oath depose, acknowledge and say that he, said R. E. Plummer, resides at Lloydhaven Drive, Lloyd Harbor, R.F.D. #3, Huntington, New York, and is a Vice President, and he, said C. P. Feighery, resides at 65 Tonnele Avenue, Jersey City, New Jersey, and is an Assistant Secretary, of said Southern Pacific Company, one of the corporations described in and which executed the above instrument; that he knows and is acquainted with the seal of said Corporation; that the seal affixed to said instrument is such corporate seal of said Corporation; and that said instrument was signed, sealed, executed and delivered in behalf of said Corporation by resolution, order and authority of the Board of Directors of said Corporation, and that he signed his name thereto by like order; that the signatures to said instrument were made by officers of said Corporation as indicated after said signatures, and that said signatures are in their own proper handwriting, and that the said Corporation executed the said instrument freely and voluntarily and for the uses and purposes therein mentioned; and [fol. 253] said R. E. Plummer and C. P. Feighery acknowledged to me said instrument to be the free and voluntary act and deed of said Corporation and that said Corporation executed the same.

And at the same time before me, the subscriber, personally appeared R. E. Plummer, one of the attorneys named in the foregoing instrument, and by virtue and in pursuance of the authority therein conferred upon him acknowledged the said instrument to be the act and deed of said Southern Pacific Company.

Given under, and in witness and faith whereof I have hereunto set, my hand and official seal the day and year first above written.

My commission as notary public will expire March 30, 1952.

I am not a stockholder, director or officer of or in Southern Pacific Company.

Robert Joseph McLean, Notary Public, State of New York, No. 60-7836400, Qualified in Westchester County, Certificates filed with New York, Kings and Bronx Co. Clks. & Reg., Commission expires March 30, 1952. (Notarial Seal.)

[fol. 254] This Agreement, dated as of the first day of July, 1951, by and between George Smith and H. J. Wylie (hereinafter called the Vendors), of the first part, The Pennsylvania Company for Banking and Trusts, a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania (hereinafter called the Trustee), of the second part, and Southern Pacific Company, a corporation duly organized and existing under the laws of the State of Delaware (hereinafter called the Company), of the third part, witnesseth as follows:

Whereas, the Vendors have contracted, or will contract, to acquire the railroad equipment described in the Lease from the Trustee to the Company (hereinafter called the Lease) prefixed to this Agreement, to which reference is hereby made, which railroad equipment, or so much thereof as may be transferred and delivered to the Trustee pursuant to this Agreement, and any other equipment transferred and delivered to the Trustee in substitution for or in addition to any of the equipment so described or in replacement thereof, is herein and therein called the Trust Equipment; and

Whereas, subscriptions have been and are being secured for an aggregate principal amount of $10,500,000 of Southern Pacific Company Equipment Trust Certificates, Series FF (hereinafter called the Trust Certificates), the proceeds, up to said principal amount, to constitute a fund to be furnished to the Trustee to be applied by it in part payment of the purchase price of the Trust Equipment; and

Whereas, the Vendors desire to secure to the parties subscribing for the Trust Certificates, or their assigns, the payment of the principal amount thereof in fifteen equal annual installments, payable respectively on July 1 in each year,

[fol. 255] from July 1, 1952, to July 1, 1966, both inclusive, as hereinafter more particularly provided, with dividends respectively to said dates of maturity at the rate of 3⅛% per annum from July 1, 1951, payable semi-annually on the first day of January and of July in each year; and to evidence the rights of such subscribers by Trust Certificates in substantially the form hereinafter set forth; and

Whereas, the Company is desirous of securing the use of the Trust Equipment upon and in connection with the properties of the Company and as set forth in the Lease;

Now, therefore, in consideration of the premises and the mutual covenants herein contained, the parties hereto agree as follows:

Article I

Section 1. The Vendors hereby agree to sell, assign, transfer and set over, or cause to be sold, assigned, transferred and set over, unto the Trustee, as trustee for the holders of the Trust Certificates hereinafter described, the Trust Equipment when and as the Trust Equipment or any part thereof is acquired. The Vendors will deliver, or cause to be delivered, the Trust Equipment to the person or persons designated by the Trustee as its agent or agents to receive such delivery, who may be any one or more of the officers and agents of the Company, and the certificate of any and every agent so designated shall be conclusive evidence of such delivery. The Trustee and the Company, simultaneously with the execution and delivery of this Agreement, shall execute and deliver the Lease prefixed hereto.

In the event that it may be deemed necessary or desirable to procure for the transportation services of the Company, and include in the trust hereby created, other railroad equip- [fol. 256] ment in lieu of any of the railroad equipment specifically described in the Lease, the Vendors may acquire or contract to acquire, and substitute under the trust, other new standard-gauge railroad equipment, other than work equipment, of a character approved by the Company. Such other new standard-gauge railroad equipment shall, by supplemental instrument or instruments, be included as part of the Trust Equipment, in place of the railroad equipment for which it will be substituted, and shall be subject to all the terms and conditions of this Agreement and of the Lease

in all respects as though it had been part of the original Trust Equipment described in the Lease.

Section 2. The Trustee shall at any time, or from time to time, upon request of the Vendors, execute and deliver to the Vendors, or upon their order, for distribution to said several subscribers, Trust Certificates of such maturity or maturities as shall be designated in such request upon the deposit in cash with the Trustee, or to its credit with such banks or bankers in the City of New York as may be designated by the Vendors and approved by the President or a Vice President of the Company, and also approved by a Vice President or the Secretary of the Trustee, of a sum equal to the principal amount of the Trust Certificates the execution and delivery of which shall be so requested.

The Trustee may likewise cause to be deposited with such banks or bankers the installments of rental payable to it on each delivery of Trust Equipment pursuant to subdivision (*a*) of Article First of the Lease and any sums received by it pursuant to Articles Fourth, Fifth and Sixth of the Lease.

Any interest allowed by the Trustee or such banks or bankers upon any moneys so deposited and any interest or other profit accruing upon any investment of such moneys as permitted by Section 9 of Article V hereof shall belong [fol. 257] to the Company, and be paid to it by or upon the order of the Trustee, so long as it shall not be in default hereunder or under the Lease, in lieu of the use of the Trust Equipment for the period before the delivery thereof. The certificates of such banks or bankers stating that they hold a specified amount subject to the order of the Trustee shall be full protection to the Trustee for its action on the faith thereof. Such banks or bankers shall be fully protected in paying such moneys so deposited with them, and any such interest, to or upon the order of the Trustee, and shall be under no obligation to see to the application thereof in accordance with the provisions of this Agreement.

Section 3. The cash deposited with or to the credit of the Trustee as in the first paragraph of Section 2 of this Article I provided (hereinafter called the Deposited Cash), any installments of rental payable on delivery of Trust Equipment pursuant to subdivision (*a*) of Article First of the Lease, any sums received by the Trustee pursuant to Articles Fourth, Fifth and Sixth of the Lease, and any securities

in which Deposited Cash may be invested shall, until paid out by the Trustee as herein provided, be held for the benefit of the holders of the Trust Certificates. Whenever from time to time any of the Trust Equipment shall be transferred and delivered to the Trustee, the Trustee shall, if requested so to do, subject to the provisions of Section 4 of this Article I, pay to the Vendors, or upon their order, out of the Deposited Cash an amount which, together with all payments previously made out of Deposited Cash, shall equal 75% of the aggregate estimated cost, as set forth in the Lease, of the Trust Equipment then and theretofore so transferred and delivered to the Trustee or 75% of the aggregate certified cost of the Trust Equipment then and theretofore so transferred and delivered to the Trustee, whichever is less. The Trustee shall make payment of the remainder of the certified cost out of the installment of [fol. 258] rental payable on such delivery pursuant to subdivision (*a*) of Article First of the Lease.

Section 4. The Trustee shall not pay out any Deposited Cash against the delivery of any of the Trust Equipment, unless and until it shall have received

(*a*) a certificate of the agent or agents designated by the Trustee to receive delivery of the Trust Equipment, stating that Trust Equipment specified by number in such certificate has been delivered to such agent or agents and marked in accordance with the provisions of Article Third of the Lease;

(*b*) a bill or bills of sale of such Trust Equipment from the manufacturers or owners to the Trustee;

(*c*) an opinion of counsel satisfactory to the Trustee (who may be counsel to the Company) that such bill or bills of sale are valid and effective to vest in the Trustee, free from all liens and encumbrances, the title so transferred to the Trustee;

(*d*) in case of any of the Trust Equipment not specifically described in the Lease but acquired as hereinafter in Section 5 of Article III provided, an opinion of counsel satisfactory to the Trustee (who may be counsel to the Company) that the supplemental lease of said equipment from the Trustee to the Company has been duly executed by the Trustee and the Company and is sufficient in form to permit it to be duly filed or recorded

in all states wherein this Agreement and the Lease are required to be filed or recorded; and

(*e*) a certificate as to the cost of such Trust Equipment signed by the President, a Vice President or the Controller of the Company, which certificate may state either that the cost of such Trust Equipment is an amount therein specified or that the cost of such Trust Equipment is not less than an amount therein specified, and such certificate shall be conclusive evidence of such cost.

[fol. 259] Section 5. Anything in this Agreement contained to the contrary notwithstanding, the aggregate principal amount of the Trust Certificates which shall be executed and delivered by the Trustee under this Agreement shall not exceed the sum of $10,500,000 at any one time outstanding, subject, however, to the provisions of Section 6 of Article II hereof.

Article II

Section 1. Each of the Trust Certificates in definitive form shall represent an interest to the amount of $1,000 in the trust of the Trust Equipment hereby created, and the holder thereof shall be entitled to receive dividends on said amount at the rate of 3⅛% per annum from July 1, 1951, payable semi-annually on the first day of January and of July in each year. The Trust Certificates shall be numbered consecutively from 1 to 10500, both inclusive, and shall become due and payable as follows:

Date of Maturity	Certificate Numbers	Principal Amount
July 1, 1952	1 to 700, inclusive	$ 700,000
July 1, 1953	701 to 1400, inclusive	700,000
July 1, 1954	1401 to 2100, inclusive	700,000
July 1, 1955	2101 to 2800, inclusive	700,000
July 1, 1956	2801 to 3500, inclusive	700,000
July 1, 1957	3501 to 4200, inclusive	700,000
July 1, 1958	4201 to 4900, inclusive	700,000
July 1, 1959	4901 to 5600, inclusive	700,000
July 1, 1960	5601 to 6300, inclusive	700,000
July 1, 1961	6301 to 7000, inclusive	700,000
July 1, 1962	7001 to 7700, inclusive	700,000
July 1, 1963	7701 to 8400, inclusive	700,000
July 1, 1964	8401 to 9100, inclusive	700,000
July 1, 1965	9101 to 9800, inclusive	700,000
July 1, 1966	9801 to 10500, inclusive	700,000
Total		$10,500,000

[fol. 260] The due date and dividend rate of each Trust Certificate shall appear upon its face.

Dividend warrants evidencing the right of the holders of the Trust Certificates to the dividends thereon shall be annexed to the respective Trust Certificates.

Section 2. The Trust Certificates, the dividend warrants to be annexed thereto, and the guaranty to be endorsed thereon by the Company as hereinafter in Article III provided, shall be in substantially the following forms:

(Form of Trust Certificate)

$1,000 No.

Southern Pacific Company

Equipment Trust

Series FF

Total Issue $10,500,000

Dividends at the rate of Three and One-Eighth

Per Cent. Per Annum,

Payable January 1 and July 1

The Pennsylvania Company for Banking and Trusts, Trustee

Principal Hereof Due July 1, 19—

The Pennsylvania Company for Banking and Trusts, Trustee under an Agreement dated as of July 1, 1951, between George Smith and H. J. Wylie, Vendors, of the first part, The Pennsylvania Company for Banking and Trusts, Trustee, of the second part, and Southern Pacific Company, of the third part, hereby certifies that the bearer, or, if this certificate be registered, the registered owner hereof, is entitled to an interest of One Thousand Dollars in the South-
[fol. 261] ern Pacific Company Equipment Trust, Series FF, payble on July 1, 19—, and to dividends thereon at the rate of three and one-eighth per cent per annum from July 1, 1951, to said date of maturity, payable semi-annually on January 1 and July 1 in each year, but only upon presenta-

tion and surrender, as they severally mature, of the dividend warrants annexed hereto, both principal and dividends being payable at the agency of the Trustee in the Borough of Manhattan, in the City of New York, in such coin or currency of the United States of America as at the time of payment is legal tender for public and private debts, but only from and out of rentals received from a certain Lease of Railroad Equipment made by The Pennsylvania Company for Banking and Trusts, Trustee, to Southern Pacific Company, dated as of July 1, 1951.

This certificate is one of an issue of ten thousand five hundred certificates for $1,000 each, similar except as to dates of maturity, numbered from 1 to 10500, both inclusive, all issued under said Agreement, under which said railroad equipment (or deposited cash or direct obligations of the United States of America in lieu thereof, as provided in said Agreement) and said Lease thereof are held by the Trustee in trust for the equal benefit of the holders of the interests represented by said certificates, to which Lease and Agreement, filed with the Trustee at its office in the City of Philadelphia, reference is made for a further statement of the rights of the holder hereof thereunder.

This certificate may be registered at the agency of the Trustee in the Borough of Manhattan, in the City of New York, in the name of the holder hereof, and such registration noted hereon by or on behalf of the Trustee. Thereafter title to the interest represented by this certificate shall pass only by transfer registered at said agency unless and until a transfer to bearer shall have been similarly registered and noted hereon. Such registration shall apply only to the principal of this certificate and not to the dividend warrants hereunto attached, which shall continue to be payable to bearer.

[fol. 262] This certificate and the attached dividend warrants are issued subject to the condition that every holder of this certificate or of any such dividend warrant, by accepting the same, agrees with every subsequent holder hereof or thereof and with the Trustee and Southern Pacific Company that delivery of this certificate (unless it be registered in the name of the holder) or any such dividend warrant by any bearer shall vest title to, and all rights under, the

same in the transferee to the same extent for all purposes as would the delivery under like circumstances of any negotiable instrument payable to bearer; and the Trustee and Southern Pacific Company shall be entitled to treat the bearer (or if this certificate be registered in the name of the holder, the registered holder) hereof or the bearer of such dividend warrant, as the case may be, as the absolute owner hereof or thereof, as the case may be, for all purposes, and shall not be affected by any notice to the contrary.

In case of default in the performance or observance of any of the covenants of Southern Pacific Company in said Lease or Agreement contained, the principal amount represented by this certificate may become or be declared due and payable in the manner and with the effect therein provided.

In witness whereof, the Trustee has caused this certificate to be signed by its President or one of its Vice Presidents, and its corporate seal or a facsimile thereof to be hereunto affixed or hereon imprinted, and to be attested by its Secretary or an Assistant Secretary, and dividend warrants bearing the facsimile signature of its Treasurer to be attached hereto, as of the first day of July, 1931.

The Pennsylvania Company for Banking and Trusts,
Trustee, by —— ——, Vice President.

Attest: —— ——, Assistant Secretary.

[fol. 263] (Form of Dividend Warrant)

$* No. —

Due to the bearer hereof on —— 1, 19—, on surrender hereof at the agency of the undersigned Trustee in the Borough of Manhattan, in the City of New York, —— Dollars, being the semi-annual dividend then due on Certificate No. — of Southern Pacific Company Equipment Trust, Series FF, payable only out of rentals under the Lease referred to in said certificate.

The Pennsylvania Company for Banking and Trusts,
Trustee, by —— ——, Treasurer.

* January 1 coupon will be $15.63. July 1 coupon will be $15.62.

(Form of Guaranty)

Southern Pacific Company, for a valuable consideration, hereby unconditionally guarantees to the bearer or registered owner of the within certificate the prompt payment of One Thousand Dollars, being the principal of said certificate, when the same shall become due and payable, whether at the maturity thereof or by declaration or otherwise, and of dividends thereon at the rate of three and one-eighth per cent per annum on the semi-annual dates mentioned in said certificate and in the dividend warrants thereunto attached, with interest on any unpaid principal or dividends at the dividend warrant rate to the extent that such interest shall be legally enforceable, all in such coin or currency of the United States of America as at the time of payment is legal tender for public and private debts.

Southern Pacific Company, by —— ——, Vice President.

[fol. 264] Section 3. The Trust Certificates shall be signed in the name and on behalf of the Trustee by its President or one of its Vice Presidents, and its corporate seal shall be thereunto affixed or a facsimile of its corporate seal shall be thereon imprinted and, in either case, attested by its Secretary or one of its Assistant Secretaries. In case any of the officers of the Trustee who shall have signed and sealed any of the Trust Certificates shall cease to be such officers of the Trustee before the Trust Certificates so signed and sealed shall have been issued and delivered by the Trustee, such Trust Certificates shall be adopted by the Trustee and be issued and delivered as though the persons who signed and sealed such certificates had not ceased to be such officers of the Trustee. The dividend warrants to be thereunto attached shall be authenticated by the facsimile signature of the present or any future Treasurer of the Trustee; and the Trustee shall adopt and use for that purpose any such facsimile signature notwithstanding the fact that such Treasurer shall have ceased to be such Treasurer at the time when any such Trust Certificate shall be issued and delivered as herein provided. Before executing or delivering any Trust Certificate all matured dividend warrants thereto appertaining shall be

cut off and cancelled and delivered by the Trustee to the Company.

Section 4. Temporary printed Trust Certificates, with or without dividend warrants, in such form and denominations as the Trustee may determine, may be issued by the Trustee, having endorsed thereon the guaranty of the Company, which shall be exchangeable upon surrender for definitive Trust Certificates, having endorsed thereon said guaranty of the Company, when the same shall have been prepared. Each of such temporary Trust Certificates shall designate the date or dates of maturity of the definitive Trust Certificate or Certificates for which it is exchange-
[fol. 265] able, and until such exchange said temporary Trust Certificates shall be entitled to the same benefit of this Agreement in all respects as said definitive Trust Certificates, including the guaranty of payment by the Company.

Section 5. The trust Certificates shall be negotiable and shall pass by delivery unless registered as to principal in the manner hereinafter provided. Unless so registered, every holder of a Trust Certificate by accepting such Trust Certificate agrees that for all purposes the bearer thereof shall be treated as the absolute owner thereof. Any of the definitive Trust Certificates may be registered in the name of the holder at the agency of the Trustee in the Borough of Manhattan, in the City of New York, and such registration shall be noted thereon by or on behalf of the Trustee. Thereafter no transfer thereof shall be valid unless made at said agency by the registered owner thereof, in person or by his duly authorized attorney, and similarly noted; but the same may be discharged from registration by being in like maner transferred to bearer, and thereafter transferability by delivery shall be restored; and such Trust Certificates may again and from time to time be registered or transferred to bearer as before.

Such registration, however, shall not affect the dividend warrants, but every such dividend warrant shall continue to be transferable by delivery merely and shall remain payable to bearer.

Anything to the contrary herein notwithstanding, the parties hereto may deem and treat the bearer of any unregistered Trust Certificate and the bearer of any divi-

dend warrant as the absolute owner of such Trust Certificate or dividend warrant, as the case may be, for the purpose of receiving payment thereof, and for all other purposes, and shall not be affected by any notice to the contrary. The parties hereto may deem and treat the [fol. 266] registered owner of any registered Trust Certificate as the absolute owner of such Trust Certificate for all purposes except payment of dividends, and shall not be affected by any notice to the contrary.

For any registration, transfer or discharge from registration, the Trustee at its option may, and if so requested by the Company shall, require the payment of a sum sufficient to reimburse it for any stamp tax or other governmental charge connected therewith.

Section 6. In case any Trust Certificate, or the dividend warrants thereto attached, shall become mutilated or defaced or be lost or destroyed, then on the terms herein set forth, and not otherwise, the Trustee shall execute and deliver a new Trust Certificate (and the Company at the request of the Trustee shall execute its guaranty thereof), with all unmatured dividend warrants appertaining thereto, of like maturity, tenor and date, and bearing the same serial number as the one mutilated, defaced, lost or destroyed, in exchange and substitution for, and upon cancellation of, the mutilated or defaced Trust Certificate and warrants, or in lieu of and substitution for the same if lost or destroyed, and shall make payment of any unpaid matured dividend warrants appertaining to the same. The applicant for a substituted Trust Certificate shall furnish to the Trustee and to the Company evidence to their satisfaction of the loss or destruction of such Trust Certificate or warrants alleged to have been lost or destroyed, and of the ownership and authenticity of such mutilated, defaced, lost or destroyed Trust Certificate and warrants, and also such security or indemnity as may be required by the Trustee and by the Company in their discretion; and shall pay all expenses and charges of such substitution or exchange. All Trust Certificates are held and owned upon the express condition that the foregoing provisions are exclusive in [fol. 267] respect of the replacement of mutilated, defaced, lost or destroyed Trust Certificates and warrants, and shall preclude any and all other rights and remedies, any law or

statute now existing or hereafter enacted to the contrary notwithstanding.

Article III

Section 1. The Company hereby accepts and becomes bound by all the terms of this Agreement, and hereby covenants and agrees to make payment of the reasonable expenses of the Trustee, and of all taxes, assessments and governmental charges mentioned in Article First of the Lease for which the Trustee may be liable, other than taxes, assessments and governmental charges which the Trustee or the Company may be required to pay or to retain from the principal of the Trust Certificates or the dividends payable in respect thereof under any present or future law of the United States of America or of any state, county, municipality or other taxing authority therein.

Section 2. The Company covenants and agrees and guarantees that the bearer or registered owner of each of the Trust Certificates shall receive the sum of $1,000, or in case of temporary Trust Certificates, the principal amount thereof, in such coin or currency of the United States of America as at the time of payment is legal tender for public and private debts, when and as the same shall become due and payable, whether at the maturity thereof or by declaration or otherwise (and, if not so paid, with interest thereon at the dividend warrant rate), and shall receive dividends thereon in like coin or currency at the rate of 3⅛% per annum, from July 1, 1951, to the date of maturity of such Trust Certificate (and if not so paid, with interest thereon at the dividend warrant rate to the [fol. 268] extent that such interest shall be legally enforceable); and the Company further covenants and agrees to endorse upon each of the Trust Certificates, at or before the issue and delivery thereof by the Trustee, its guaranty of the prompt payment of the principal thereof and of the dividends thereon, in substantially the form in Section 2 of Article II hereof provided. Said guaranty so endorsed shall be signed in the name and on behalf of the Company by its President or one of its Vice Presidents. In case any of the officers of the Company who shall have signed such guaranty shall cease to

be such officer of the Company before the Trust Certificates so signed shall have been actually issued and delivered by the Trustee, such guaranty shall, nevertheless, be as effective and binding upon the Company as though the person who signed such guaranty had not ceased to be such officer of the Company.

Section 3. The Company covenants and agrees that it will pay or cause to be paid or discharged, or make adequate provision for the satisfaction or discharge of, any claim which, if unpaid, might become a lien or charge upon or against any of the Trust Equipment, except upon the leasehold interest of the Company therein; but this provision shall not require the payment of any such claim so long as the validity thereof shall be contested in good faith and by appropriate legal proceedings, unless thereby, in the judgment of the Trustee, the rights or interests of the holders of Trust Certificates may be materially endangered.

Section 4. The Company covenants and agrees to pay the expenses incident to the preparation and execution of the Trust Certificates and dividend warrants, including any temporary Trust Certificates to be issued hereunder, and also connected with the preparation, execution, recording, registration and filing hereof or of the Lease and of any [fol. 269] instruments executed under the provisions hereof or of the Lease in respect of the Trust Equipment, or any equipment used to replace any of the same. The Company with all convenient speed will cause this Agreement and the Lease and any supplemental agreement or supplemental lease to be duly filed and refiled, or recorded and rerecorded, as may be required by law, in all states wherein are situated railroad lines owned or operated by the Company or by companies to which it shall permit the use of the Trust Equipment (otherwise than in the usual interchange of traffic) as authorized by Article Seventh of the the Lease.

Section 5. The Company covenants and agrees that in case the lower of the aggregate estimated cost and the aggregate actual cost of so much of the railroad equipment specifically described in the Lease as may be transferred and delivered to the Trustee together with any other equipment transferred and delivered to the Trustee in substitu-

tion for any of such specifically described equipment shall not be at least $14,000,000, it will for account of the Vendors cause to be vested in the Trustee by the manufacturers or owners thereof, absolutely and free from all liens and encumbrances, additional new standard-gauge railroad equipment, other than work equipment, of such cost that the lower of the aggregate estimated cost and the aggregate actual cost of all railroad equipment acquired for the trust by this Agreement created will be at least $14,000,000; and upon the transfer and delivery of such new railroad equipment to the Trustee, the same shall be and become a part of the Trust Equipment. Upon such transfer and delivery, the Vendors shall be entitled to receive Deposited Cash upon the terms and conditions in Article I hereof provided.

Section 6. The Company covenants and agrees from time to time to do all such acts and execute all such instruments [fol. 270] of further assurance as it shall be reasonably requested by the Trustee to do or execute for the purpose of fully carrying out and effectuating this Agreement and the Lease and the intent thereof.

Article IV

In case one or more of the events of default described in Article Sixth of the Lease shall happen, the Trustee in its discretion may, and at the request of the holders of not less than 25% in principal amount of the Trust Certificates then outstanding shall, declare the principal of all of the Trust Certificates to be due and payable, and thereupon the same shall become and be immediately due and payable. In any such case the Trustee may retake possession of the Trust Equipment or any part thereof and may either hold or lease the same or any part thereof, or dispose of the same or any part thereof (so far as may be necessary to perform the trusts hereunder), in such manner, at public or private sale, for cash or upon credit, as the Trustee may deem most beneficial to the interest of the holders of the Trust Certificates. In case one or more of said events of default shall happen, then, upon the written request of the holders of not less than 25% in principal amount of the Trust Certificates at the time outstanding, it shall be the duty of the Trustee, upon being indemnified as here-

inafter provided, to take all steps for the protection and enforcement of its rights and the rights of the holders of the Trust Certificates, and to exercise one or more of the powers of entry, sale and lease in the Lease conferred or to take appropriate judicial proceedings by action, suit or otherwise, as the Trustee being advised by counsel shall deem most expedient in the interest of the holders of the Trust Certificates; but, anything in this Agreement to the contrary notwithstanding, upon proper indemnity to the Trustee, the holders of a majority in principal amount of [fol. 271] the Trust Certificates then outstanding shall have the right from time to time to direct and to control the proceedings for any enforcement of the Lease and of this Agreement and the sale or lease of the Trust Equipment. The proceeds of such lease or sale shall be applied by the Trustee to the payment, after deducting the expenses of the trust and all taxes, assessments and governmental charges which the Trustee may by law be required to pay in respect of the trust or the Trust Certificates or the dividends thereon,

(1) of the dividends then due with interest on any overdue dividends at the dividend warrant rate to the extent that such interest shall be legally enforceable; and

(2) of the principal of all outstanding Trust Certificates with interest thereon at the dividend warrant rate from the last preceding dividend date, whether said Certificates or any of them shall then have matured by their terms or not;

all of said payments to be in full, if said proceeds shall be sufficient, and if not, then *pro rata*, without preference of principal over dividends or of dividends over principal or otherwise, and without regard to the dates of maturity thereof.

The foregoing provisions, however, are subject to the condition that if at any time after the principal of the Trust Certificates shall have been declared and have become due and payable, as hereinbefore provided, but before July 1, 1966, all arrears of rental (with interest upon any overdue installment at the dividend warrant rate to the extent

that such interest shall be legally enforceable), the expenses of the Trustee and all other sums which shall have become due and payable by the Company hereunder or under the Lease (other than the principal of Trust Certificates and rental installments which shall not at the time have matured [fol. 272] according to their terms) shall be paid by the Company before any sale or lease by the Trustee of any of the Trust Equipment, and every other default in the observance or performance of any covenant or condition of this Agreement or the Lease shall be made good or secured to the satisfaction of the Trustee, or provision deemed by the Trustee to be adequate shall be made therefor, then and in every such case the Trustee, if so requested by the holders of a majority in principal amount of the Trust Certificates then outstanding and which shall not have then matured according to their terms, shall, by written notice to the Company, waive the default by reason of which the principal of the Trust Certificates shall have been declared and become due and the consequences of such default, but no such waiver shall extend to or affect any subsequent default or impair any right consequent thereon.

No retaking of possession of the Trust Equipment by the Trustee, nor any withdrawal, lease or sale thereof, nor any action or failure or omission to act against the Company or in respect to the Trust Equipment on the part of the Trustee or on the part of any holder of any Trust Certificate or dividend warrant, nor any delay or indulgence granted to the Company by the Trustee or any such holder, shall affect the obligations of the Company under this Agreement or under the Lease or under its guaranty.

Article V

Section 1. The Trustee hereby covenants and agrees to perform, and, so far as possible, to enforce the performance of, all and singular the terms, conditions and covenants of the Lease, and to cause the Trust Equipment to be marked as provided in Article Third of the Lease.

Section 2. The Trustee covenants and agrees to apply and distribute the rentals received by it under clause (*b*) [fol. 273] of Article First of the Lease, other than rentals paid to restore amounts to Deposited Cash, and the rentals

received by it under clauses (*c*), (*d*) and (*e*) of said Article First, when and as the same shall be received, for the following purposes, to wit:

(*a*) to the payment of the necessary and reasonable expenses of the trust, including all expenses connected with the Trust Equipment and the Lease thereof;

(*b*) to the payment of any and all taxes, assessments and governmental charges upon the income or property of the trust, or the agreements evidencing the same, which the Trustee may be required to pay, but excluding any and all taxes, assessments and governmental charges which the Trustee may be required to pay or to retain from the principal of the Trust Certificates or from the dividends payable thereon, under any present or future law of the United States of America or of any state, county, municipality or other taxing authority therein;

(*c*) to the payment of the dividends payable on the Trust Certificates, and any interest payable on overdue installments of principal and dividends, when and as the same shall become payable according to the terms thereof or hereof; and

(*d*) to the payment of the principal of the Trust Certificates when and as the same shall become payable according to the terms thereof or hereof.

Section 3.—The Trustee shall cause to be kept at an agency in the Borough of Manhattan, in the City of New York, books for the registration and transfer of the Trust Certificates, and upon presentation for such purpose the Trustee will register or cause to be registered as hereinbefore provided, and under such reasonable regulations as may be prescribed, any of the Trust Certificates. The [fol. 274] Trustee, at all times until the payment of the principal of all the Trust Certificates, shall keep an agency in the Borough of Manhattan, in the City of New York, where the Trust Certificates and dividend warrants may be presented for payment.

Section 4. The Trustee assumes no liability for anything other than its own willful misconduct or negligence. It shall be required to undertake no act or duty in the way

of taking care of, or taking possession of, the Trust Equipment until fully secured against all liability. No duty of insurance or of repairs or of the protection of any of the trust property is incumbent upon it, nor shall it be responsible for the filing, refiling, recording or rerecording of this Agreement or of the Lease or of any other instrument; and the Trustee may issue and deliver Trust Certificates in advance of such filing or recording.

Section 5. The Trustee shall be under no obligation to take any action for the execution or enforcement of any of the trusts hereby created unless requested thereunto in writing by the holders of not less than 25% in principal amount of the then outstanding Trust Certificates and upon being satisfactorily indemnified against expense and liability with respect thereto, and also furnished with proof satisfactory to it as to the ownership of the Trust Certificates and dividend warrants in respect of which any notice or request may be made; but neither any such request nor this provision therefor shall affect any discretion herein elsewhere specifically given to the Trustee to determine what action it shall take in respect of any such default, or to take action without request.

Section 6. No holder of any Trust Certificate or dividend warrant shall have any right to institute any suit, action or proceeding for the execution and enforcement [fol. 275] of the trust hereby created, unless, after the aforesaid request in writing by the holders of not less than 25% in principal amount of the then outstanding Trust Certificates shall have been made to the Trustee, indemnity satisfactory to it provided, and a reasonable time elapsed for action by the Trustee upon such request, it shall decline to institute any proceedings pursuant thereto.

Neither the provisions of this Section nor the provisions of Section 5 of this Article shall affect or limit in any way the obligations of the Company or the rights of holders of Trust Certificates under the Company's guaranty provided for hereinabove.

Section 7. The Trustee may, for all purposes, conclusively assume that the Company is not in default under the terms hereof until notified in writing to the contrary by the holders of at least one-tenth in principal amount of the Trust Certificates then outstanding, which notice shall dis

tinctly specify the default desired to be brought to the attention of the Trustee.

Section 8. The Trustee shall not incur any liability to anybody in acting upon any notice, consent, order, certificate, dividend warrant or other paper or instrument believed by it to be genuine or authentic and to be signed by the proper party or parties.

Section 9. The Trustee will allow interest upon all moneys received by it under the provisions of this Agreement or of the Lease at the rate generally prevailing among Philadelphia trust companies or allowed by it upon deposits of a similar character, if interest is allowed generally by such trust companies or by the Trustee upon such deposits.

At any time, and from time to time, if at the time there shall be no default under the terms of the Lease or of this [fol. 276] Agreement or of any supplemental lease or supplemental agreement, the Trustee, on request of the Company, shall invest and reinvest Deposited Cash held by it in bonds, notes or other direct obligations of the United States of America (herein and in the Lease called Government Securities), at such prices, including any premium and accrued interest, as shall be set forth in a request by the Company, such Government Securities to be held by the Trustee in trust for the benefit of the holders of the Trust Certificates.

The Trustee shall, on request of the Company, or the Trustee may, in the event funds are required for payment to or upon the order of the Vendors against delivery of Trust Equipment, sell such Government Securities, or any portion thereof, and restore to Deposited Cash the proceeds of any such sale (including an amount equal to accrued interest paid from Deposited Cash at the time of purchase).

The Trustee shall restore to Deposited Cash, out of rent received by it for that purpose, under the provisions of subdivision (*b*) of Article First of the Lease, an amount equal to any expenses incurred or sustained in connection with any purchase or sale of Government Securities, and also an amount equal to any loss of principal incident to the sale of any Government Securities for a sum less than the amount paid therefor out of Deposited Cash, including accrued interest. The Company, if not in default under the terms of the Lease or of this Agreement or of any sup-

plemental lease or supplemental agreement, shall be entitled to receive any profit which may be realized from any sale by the Trustee of Government Securities or any portion thereof.

Any interest allowed or received by the Trustee upon moneys received by it under the provisions of this Agreement and any interest received upon investments made by [fol. 277] the Trustee on request of the Company as aforesaid (in excess of accrued interest paid from Deposited Cash at the time of purchase) shall, so long as there shall be no default on the part of the Company hereunder or under the Lease, be paid to the Company by the Trustee.

Any request made pursuant to the provisions of this Section shall be in writing and signed by the President, a Vice President or the Controller of the Company.

Section 10. The Trustee shall, at least once in each year, render to the Company a statement of its said trust and of the accounts relating thereto, and vering such matters as the Company may properly require, and the Vendors and the Company, or either of them, may from time to time examine the books and accounts of the Trustee relating to the Trust Certificates, to the Lease, to this Agreement and to the acts of the Trustee hereunder.

Section 11. The Trustee may resign and be discharged from the trusts created by this Agreement by giving to the Company and to the holders of the Trust Certificates then outstanding notice in writing of such resignation, specifying a date when such resignation shall take effect. Such notice may be given to the holders of the Trust Certificates by publication of the notice at least once in each of three successive calendar weeks prior to the date specified in such notice in a daily newspaper published in the Borough of Manhattan, in the City of New York, and in a daily newspaper published in the City of Philadelphia, Pennsylvania. Such resignation shall take effect on the date specified in such notice (which date shall not be less than 30 days after the giving or first publication of such notice), unless previously a successor trustee shall be appointed as hereinafter provided, in which event such resignation shall take effect immediately upon the appointment of such successor trustee.

[fol. 278] Any trustee hereunder may be removed at any

time by an instrument in writing filed with the Trustee and executed by the holders of a majority in principal amount of the Trust Certificates at the time outstanding.

Section 12. In case at any time the Trustee shall resign or shall be removed or otherwise shall become incapable of acting, a successor may be appointed by the holders of a majority in principal amount of the Trust Certificates at the time outstanding, by an instrument or concurrent instruments signed by such Certificate holders or their attorneys-in-fact duly authorized; but until a new trustee shall be appointed by said Certificate holders as herein authorized, the Company, by an instrument executed under its corporate seal, may appoint a trustee to fill such vacancy. Every such successor trustee, whether appointed by the Certificate holders or by the Company, shall always be a trust company or bank, having power so to act, organized under the laws of the United States of America, of the Commonwealth of Pennsylvania, or of the State of New York, and having an office either in the City of Philadelphia or in the Borough of Manhattan, in the City of New York, and having a capital and surplus aggregating at least $2,000,000. After any such appointment by the Company it shall cause notice of such appointment to be published once a week in each of four successive weeks in a daily newspaper published in the Borough of Manhattan, in the City of New York, and in a daily newspaper published in the City of Philadelphia, Pennsylvania; but any new trustee so appointed by the Company shall immediately, and without further act, be superseded by a trustee appointed in the manner above provided by the holders of a majority in principal amount of the Trust Certificates at the time outstanding.

[fol. 279] Any successor trustee appointed hereunder shall execute, acknowledge and deliver to the Company an instrument accepting such appointment hereunder, and thereupon such successor trustee, without any further act, deed or conveyance, shall become vested with title to the trust estate, and with all the rights, powers, trusts, duties and obligations of its predecessor in trust hereunder, with like effect as if originally named as trustee herein, and the trustee ceasing to act shall, on the written request of such

successor trustee, assign and transfer the trust estate or cause the trust estate to be assigned and transferred to the successor trustee, and shall be entitled to the payment of its charges and expenses theretofore incurred. Upon request of such successor trustee, the Company shall execute and deliver such instruments of further assurance as may reasonably be required for more fully and certainly vesting in and confirming to such successor trustee all the right, title and interest of the predecessor trustee in and to the trust estate and such rights, powers, trusts, duties and obligations. All instruments herein provided for shall be at the cost of the Company.

Any corporation resulting from any merger or consolidation to which the Trustee, or any successor to it, shall be a party, provided such corporation shall be a corporation having power so to act and organized under the laws of the United States of America, of the Commonwealth of Pennsylvania, or of the State of New York, and shall do business in the City of Philadelphia, Pennsylvania, or in the Borough of Manhattan, in the City of New York, and have a capital and surplus aggregating at least $2,000,000, shall be the successor trustee under this Agreement without the execution or filing of any paper or any further act on the part of any of the parties hereto, anything herein to the contrary notwithstanding.

[fol. 280] Article VI

No recourse under any obligation, covenant or agreement of this Agreement, or of the guaranty of the Company respecting any Trust Certificate or dividend warrant issued hereunder, shall be had against any stockholder, officer or director of the Company, by the enforcement of any assessment or by any legal or equitable proceeding by virtue of any statute or otherwise; it being expressly agreed and understood that this Agreement and said guaranty are solely corporate obligations, and that no personal liability whatever shall attach to or be incurred by the stockholders, officers or directors of the Company, or any of them, under or by reason of any of the obligations, covenants or agreements contained in this Agreement or in the guaranty of the Company respecting any of the Trust Cer-

tificates or dividend warrants issued hereunder, or implied therefrom, and that any and all personal liability, either at common law or in equity, or by statute or constitution, of every such stockholder, officer or director is hereby expressly waived as a condition of and consideration for the execution of this Agreement and the issue of such Trust Certificates and dividend warrants.

Article VII

Any request or other instrument required by this Agreement to be signed or executed by holders of Trust Certificates may be in any number of concurrent instruments of similar tenor, and may be signed or executed by such Certificate holders in person, or by an agent or attorney appointed by an instrument in writing. Proof of the execution of any such request or other instrument, or of a writing appointing any such agent or attorney, or of the holding by any person of Trust Certificates, shall be sufficient for any purpose of this Agreement, and shall be conclusive in favor [fol. 281] of the Trustee with regard to any action taken by the Trustee under such request or other instrument, if made in the following manner, viz.:

(*a*) The fact and date of the execution by any person of any such request or of any other instrument in writing may be proved by the certificate of any notary public or of any other officer authorized to take acknowledgments of deeds to be recorded in the state where the acknowledgment may be taken, certifying that the person signing such request or other instrument acknowledged to him the execution thereof, or by the affidavit of a witness to such execution.

(*b*) The amount of Trust Certificates transferable by delivery held by any person executing any such request or other instrument as a Certificate holder, and the serial numbers of the Trust Certificates held by such person and the date of his holding the same, may be proved by a certificate executed by any trust company, bank, banker or other depositary wheresoever situated whose certificate shall be deemed by the Trustee to be satisfactory, showing that, at the date therein mentioned, such person had on deposit with such depositary,

or exhibited to such depositary, the Trust Certificates numbered and described in such certificate. The Trustee may presume the continuance of any such holding, unless and until it receives proof satisfactory to it to the contrary.

(c) The ownership of Trust Certificates registered as to principal shall be determined by the register of the Trust Certificates.

Article VIII

At the termination of the Lease to the Company, any moneys remaining in the hands of the Trustee, after paying the principal of and dividends upon the Trust Certificates, and the expenses of the Trustee, including its reasonable compensation, shall be paid to the Company.

[fol. 282]

Article IX

Nothing in this Agreement, express or implied, is intended or shall be construed to confer upon, or to give to, any person, firm or corporation other than the parties hereto and the holders of the Trust Certificates and appurtenant dividend warrants, any right, remedy or claim, under or by reason of this Agreement, or any term, covenant or condition hereof, and all of the terms, covenants, conditions, promises and agreements in this Agreement contained shall be for the sole and exclusive benefit of the parties hereto and their successors and of the holders of the Trust Certificates and dividend warrants.

Article X

The term "Trustee" as used herein and in the Lease shall be held and construed to mean The Pennsylvania Company for Banking and Trusts, its successors and assigns; the word "Company" to mean and include the party of the third part, its successors and assigns; and the words "Certificate holder" and "holder", to include the plural as well as the singular number and, unless the context otherwise requires, to include the bearer of any unregistered Trust Certificate and/or dividend warrant and the registered owner of any registered Trust Certificate. The term "Trust Equipment" wherever used herein or in the Lease, unless otherwise indi-

cated by the context, is intended to include all railroad equipment at any time covered by the Lease or any supplemental lease or this Agreement or required or intended so to be.

In case of the death of either of the Vendors, the other Vendor shall have and discharge all the powers of the Vendors. In case of the death or inability to act of both of the Vendors, the Trustee shall receive and distribute or pay for the account of the original Vendors, to the parties entitled [fol. 283] to receive the same from the original Vendors, all Trust Certificates issuable or Deposited Cash or other moneys payable to the original Vendors by the Trustee hereunder. Any action taken by either of the Vendors shall have the same force and effect as if taken by both of them.

Whenever, under the provisions hereof, it is necessary or proper for any notice or demand to be made to or upon the Company, or if at any time it is desired to give any such notice or make any such demand, such notice or demand may be given or made to the Company by depositing a written statement thereof, securely enclosed in a postpaid wrapper, in the United States mail, directed to the Company at New York City, N. Y., and an affidavit by any person representing or acting on behalf of the Trustee as to such mailing, having the registry receipt or certificate attached, shall be conclusive evidence of the giving of such notice and the making of such demand.

This Agreement may be simultaneously executed in several counterparts, each of which so executed shall be deemed to be an original, and such counterparts together shall constitute but one and the same instrument.

The Pennsylvania Company for Banking and Trusts does hereby constitute and appoint Wm. M. David to be its attorney, for it and in its name and as and for its corporate act and deed to acknowledge this Agreement, before any person having authority by the laws of the Commonwealth of Pennsylvania or elsewhere to take such acknowledgment, to the intent that the same may be duly recorded.

Southern Pacific Company does hereby constitute and appoint R. E. Plummer to be its attorney, for it and in its name and as and for its corporate act and deed to acknowledge this Agreement, before any person having authority by the laws of the Commonwealth of Pennsylvania or else-

where to take such acknowledgment, to the intent that the same may be duly recorded.

[fol. 284] In witness whereof, the parties of the first part have hereunto set their hands and seals, and the parties of the second and third parts have caused their names to be signed hereto by their respective officers thereunto duly authorized and their respective corporate seals to be hereto affixed, duly attested, as of the day and year first above written.

George Smith (L. S.), H. J. Wylie (L. S.)

Signed, sealed and delivered by George Smith and H. J. Wylie in the presence of:

A. R. Olson, H. Nelson.

The Pennsylvania Company for Banking and Trusts, By Wm. M. David, Vice President. (Corporate Seal.)

Attest: J. W. Thorn, Assistant Secretary.

Signed, sealed and delivered by The Pennsylvania Company for Banking and Trusts in the presence of:

A. R. Olson, H. Nelson.

Southern Pacific Company, By R. E. Plummer, Vice President. (Corporate Seal.)

Attest: C. P. Feighery, Assistant Secretary.

Signed, sealed and delivered by Southern Pacific Company in the presence of:

C. J. Huhn, F. H. Coyne, Jr.

[fol. 285] State of New York,
County of New York, ss:

Be it remembered, and I do hereby certify that on this 9th day of July, A. D. 1951, before me, Robert Joseph McLean, the undersigned officer, a Notary Public, duly commissioned and sworn in and for said State and County, personally came and appeared the within named George

Defendant's Exhibit I

8-51-1M
V. S. ANDRUS
President

SOUTHERN PACIFIC EQUIPMENT COMPANY

8-2004

Ro 752, 65 Market Street, San Francisco 5, C rnia

SEPT 19 1950

Order No. 9-P-3061-74-302

COPY

Bid No. SPL-325-327

MODERN RAILWAY DEVICES INC
1322 N ELSTON AVE.
CHICAGO ILL

PLEASE INCLUDE REFERENCE TO ROOM 982 IN ADDRESSING ANY CORRESPONDENCE TO THE UNDERSIGNED.

Please ship the following to SOUTHERN PACIFIC EQUIPMENT CO.,
care of 1551 GEAL STRT SACRAMENTO, CALIF.

SEND INVOICE IN QUADRUPLICATE WITH BILL OF LADING OR RECEIPT TO ROOM 982, 65 MARKET STREET, SAN FRANCISCO 5, CALIFORNIA.

via OBTAIN ROUTING FROM MR D J MC GANNEY
310 SO MICHIGAN AVENUE CHICAGO ILL

QUANTITY	DESCRIPTION	OUR STOCK NO.	
1000	CARSETS WASTE RETAINERS FOR 5-1/2" X 10" JOURNAL BOX CP-34477 APPROX WEIGHT 6# CARSET 3.60 CAR SET		COPY

1000 CARSETS WASTE RETAINERS FOR 5-1/2" X 10" JOURNAL BOX
CP-34477
APPROX WEIGHT 6#. CARSET
3.60 CAR SET

COPY

DRAWINGS TO BE SUBMITTED FOR APPROVAL

ACTION No. 44526 DATE JUL 8 1952

DEFENDANT'S EXHIBIT No. ....

RESALE CERTIFICATE NO. 17 ..... Deputy Clerk

FOB CHICAGO ILL

BMB
VCH-2
HJS
DJM-2
M

SHIP:
300 C.S. 1/2/51
350 C.S. 2/1/51
350 C.S. 3/1/51

ANY CORRESPONDENCE IN CONNECTION WITH THIS ORDER TO BE ADDRESSED TO UNDERSIGNED IN DUPLICATE

PLEASE SHOW OUR STOCK ITEM NUMBER ON INVOICES, PACKING LISTS, ETC.

V. S. ANDRUS, President

(Signed) G. M. Betterton

BY: .....

(SEE REVERSE SIDE FOR CONDITIONS AND INSTRUCTIONS)

Smith and H. J. Wylie, signers of and parties to the above instrument, to me personally known and personally known to me to be the same persons and individuals described in, and whose names are subscribed to, and who executed, and who are parties to, the above annexed, within and foregoing instrument, and severally duly acknowledged to me that, being informed of the contents of said instrument, they executed, signed, sealed and delivered said instrument freely and voluntarily, to be and as their free and voluntary act and deed for the uses, purposes and considerations therein contained, mentioned, expressed and set forth.

And I further certify that the foregoing instrument was executed and acknowledged according to and in conformity with the laws of said State.

Given under, and in witness and faith whereof I have hereunto set, my hand and official seal the day and year first above written.

My commission as notary public will expire March 30, 1952.

Robert Joseph McLean, Notary Public State of New York. No. 60-7836400. Qualified in Westchester County. Certificates filed with New York, Kings and Bronx Co. Clks. & Reg. Commission expires March 30, 1952. (Notarial Seal.)

[fol. 286] State of New York,
County of New York, ss:

Be it remembered, and I do hereby certify that on this 9th day of July, A. D. 1951, before me, Robert Joseph McLean, the undersigned officer, a Notary Public, duly commissioned and sworn in and for the State and County aforesaid, personally came and appeared Wm. M. David, a Vice President, and J. W. Thorn, an Assistant Secretary, of The Pennsylvania Company for Banking and Trusts, a corporation incorporated and existing under and by the laws of the Commonwealth of Pennsylvania and one of the corporations a party to, described in, and which executed the above, within and foregoing instrument, who are known to me to be a Vice President and an Assistant Secretary,

respectively, of said Corporation, and who are to me personally known and personally known to me to be the same persons whose names are subscribed to said instrument, and who executed said instrument, as such Vice President and Assistant Secretary, respectively, on behalf of said corporation therein named and who acknowledged themselves to be a Vice President and an Assistant Secretary, respectively, of said Corporation and who acknowledged to me that said Corporation executed said instrument and that they as such Vice President and Assistant Secretary, respectively, being informed of the contents of said instrument and duly authorized so to do, executed, signed, sealed with the corporate seal, and delivered said instrument on behalf of and for and as the act of said Corporation by signing the name of the Corporation by themselves as such officers, respectively, as the free and voluntary act and deed of said Corporation and as their own free and voluntary act and deed, for the uses, purposes and considerations therein set forth, expressed and contained.

And at the same time the said Wm. M. David and J. W. Thorn, being by me duly sworn according to law, did each for himself and upon his oath depose, acknowledge and say that he, said Wm. M. David, resides at 42 West School Lane, Philadelphia 44, Pennsylvania, and is a Vice President, and he, said J. W. Thorn, resides at Waterloo Road, R.F.D.; Berwyn, Pennsylvania, and is an Assistant Secretary, of said The Pennsylvania Company for Banking and Trusts, one of the corporations described in and which executed the above instrument; that he knows and is acquainted with the seal of said Corporation; that the seal affixed to said instrument is such corporate seal of said Corporation; and that said instrument was signed, sealed, executed and delivered in behalf of said Corporation by resolution, order and authority of the Board of Directors of said Corporation, and that he signed his name thereto by like order; that the signatures to said instrument were made by officers of said Corporation as indicated after said signatures and that said signatures are in their own proper handwriting, and that the said Corporation executed the said instrument freely and voluntarily and for the uses [fol. 287] and purposes therein mentioned; and said Wm. M. David and J. W. Thorn acknowledged to me said instru-

ment to be the free and voluntary act and deed of said Corporation and that said Corporation executed the same.

And at the same time before me, the subscriber, personally appeared Wm. M. David, one of the attorneys named in the foregoing instrument, and by virtue and in pursuance of the authority therein conferred upon him acknowledged the said instrument to be the act and deed of said The Pennsylvania Company for Banking and Trusts.

Given under, and in witness and faith whereof I have hereunto set, my hand and official seal the day and year first above written.

My commission as notary public will expire March 30, 1952.

I am not a stockholder, director or officer of or in The Pennsylvania Company for Banking and Trusts.

Robert Joseph McLean, Notary Public, State of New York. No. 60-7836400. Qualified in Westchester County. Certificates filed with New York, Kings and Bronx Co. Clks. & Reg. Commission expires March 30, 1952. (Notarial Seal.)

[fol. 288] STATE OF NEW YORK,
County of New York, ss:

Be it remembered, and I do hereby certify that on this 9th day of July, A. D. 1951, before me, Robert Joseph McLean, the undersigned officer, a Notary Public, duly commissioned and sworn in and for the State and County aforesaid, personally came and appeared R. E. Plummer, a Vice President, and C. P. Feighery, an Assistant Secretary, of Southern Pacific Company, a corporation incorporated and existing under and by the laws of the State of Delaware and one of the corporations a party to, described in, and which executed the above, within and foregoing instrument, who are known to me to be a Vice President and an Assistant Secretary, respectively, of said Corporation, and who are to me personally known and personally known to me to be the same persons whose names are subscribed to said instrument, and who executed said instrument, as such Vice President and Assistant

Secretary, respectively, on behalf of said Corporation therein named and who acknowledged themselves to be a Vice President and an Assistant Secretary, respectively, of said Corporation and who acknowledged to me that said Corporation executed said instrument and that they as such Vice President and Assistant Secretary, respectively, being informed of the contents of said instrument and duly authorized so to do, executed, signed, sealed with the corporate seal, and delivered said instrument on behalf of and for and as the act of said Corporation by signing the name of the Corporation by themselves as such officers, respectively, as the free and voluntary act and deed of said Corporation and as their own free and voluntary act and deed, for the uses, purposes and considerations therein set forth, expressed and contained.

And at the same time the said R. E. Plummer and C. P. Feighery, being by me duly sworn according to law, did each for himself and upon his oath depose, acknowledge and say that he, said R. E. Plummer, resides at Lloydhaven Drive, Lloyd Harbor, R.F.D. #3, Huntington, New York, and is a Vice President, and he, said C. P. Feighery, resides at 65 Tonnele Avenue, Jersey City, New Jersey, and is an Assistant Secretary, of said Southern Pacific Company, one of the corporations described in and which executed the above instrument; that he knows and is acquainted with the seal of said Corporation; that the seal affixed to said instrument is such corporate seal of said Corporation; and that said instrument was signed, sealed, executed and delivered in behalf of said Corporation by resolution, order a: authority of the Board of Directors of said Corporation, d that he signed his name thereto by like order; that the signatures to said instrument were made by officers of said Corporation as indicated after said signatures and that said signatures are in their own proper handwriting, and that the said Corporation executed the said instrument freely and voluntarily, and for the uses and purposes [fol. 289] therein mentioned; and said R. E. Plummer and C. P. Feighery acknowledged to me said instrument to be the free and voluntary act and deed of said Corporation and that said Corporation executed the same.

And at the same time before me, the subscriber, personally appeared R. E. Plummer, one of the attorneys

named in the foregoing instrument, and by virtue and in pursuance of the authority therein conferred upon him acknowledged the said instrument to be the act and deed of said Southern Pacific Company.

Given under, and in witness and faith whereof I have hereunto set my hand and official seal the day and year first above written.

My commission as notary public will expire March 30, 1952.

I am not a stockholder, director or officer of or in Southern Pacific Company.

Robert Joseph McLean, Notary Public, State of New York, No. 60-7836400, Qualified in Westchester County, Certificates filed with New York, Kings, and Bronx Co. Clks. & Reg. Commission expires March 30, 1952. (Notarial seal.)

State of New York,
County of New York, ss:

I do hereby certify that $11,550.00, United States Revenue Stamps, being the amount required by law, have been affixed to one of the original counterparts of the within agreement and cancelled.

Dated, July 11th, 1951.

Robert Joseph McLean, Notary Public, State of New York, No. 60-7836400, Qualified in Westchester County, Certificates filed with New York, Kings, and Bronx Co. Clks. & Reg. Commission expires March 30, 1952. (Notarial seal.)

CONDITIONS AND INSTRUCTIONS

GENERAL:

1. Acceptance of order constitutes acceptance of all it's terms and conditions. **Prompt advice by letter must be given if material ordered cannot be furnished strictly in accordance with terms shown.** No deviation from terms hereof are binding upon the buyer unless expressly agreed to by the buyer in writing.

2. All correspondence relative to this order and invoices applying on it must give reference to complete order and requisition number as well as name of consignee and destination.

3. In consideration of One (1) Dollar and other good and valuable considerations in hand paid, the receipt whereof is hereby acknowledged, the Seller hereby grants to the Buyer, the right to repair the subject matter of this contract, by replacing any part that may be destroyed, damaged, lost, stolen or worn out, by making such part for itself or by purchasing it in the open market; provided, such part is not individually covered by patents; this right to repair to apply to all patents now or hereafter owned or controlled or acquired by Seller or under which Seller may become licensed, and to thereafter use and/or vend such repaired subject matter; and, if this contract relates to rolling stock or equipment interchanged with other railroads the rolling stock or equipment of the Buyer may be repaired by other railroads irrespective of where the repair parts may be obtained, and the Buyer shall have the same right to use and/or vend such repair parts for the purpose of repairing foreign rolling stock or equipment received in interchange with other railroads. This agreement shall include the right on the part of the Buyer to purchase repair parts in anticipation of breakage instead of waiting until the breakage actually occurs before ordering the repair parts.

4. Seller agrees to indemnify the Buyer against all claims, damages, losses, costs and expenses, including attorney's fees, arising or growing out of patents and copyrights, and all royalties in connection therewith, and arising or growing out of the purchase and use by the Buyer of the subject matter of this contract.

5. The provisions hereof shall inure to the benefit of and be binding upon the principals, agents, personal representatives, successors and assigns of the Seller and the agents, successors and assigns of the Buyer.

SHIPMENTS:

6. All material must be marked or tagged with complete order number and requisition number and be accompanied by packing list in detail.

7. No charge for package or drayage will be allowed. Material must be packed in conformity with tariff classification requirements so as to secure lowest freight rate.

8. All shipments unless otherwise specified must move "Collect" from f. o. b. point.

9. When forwarding by express both package and express receipt must plainly indicate express routing desired.

10. Material should not be forwarded by Parcel Post unless you are specifically instructed to so handle.

11. Unless advised to the contrary, small lots under 100 lbs. should be consolidated with others for same destination to make freight shipments of 100 lbs. or more.

12. Shipments on this order which may originate off Southern Pacific Co. rails must be routed in accordance with instructions which must be obtained from our representative shown on face of this order.

13. In order that our material may move at lowest possible cost, shipments of less than minimum carload should only be made when material is such as is usually ordered in less than carload quantities or it is not reasonable to assume we could increase sufficiently to make minimum carload nor authorize consolidation of shipments for two or more destinations.

In all other cases before allowing less than a carload to leave your plant you should have authority for such action either from the office placing order or Traffic Representative to whom you were referred for routing.

When there are different rates on the same commodity depending on the carload minimum used, you should load to a minimum taking the lowest rate unless authorized as above to do otherwise.

3. In consideration of One (1) Dollar and other good and valuable considerations in hand paid, the receipt whereof is hereby acknowledged, the Seller hereby grants to the Buyer, the right to repair the subject matter of this contract by replacing any part that may be destroyed, damaged, lost, stolen or worn out, by making such part for itself or by purchasing it in the open market; provided, such part is not individually covered by patents; this right to repair to apply to all patents now or hereafter owned or controlled or acquired by Seller or under which Seller may become licensed, and to thereafter use and/or vend such repaired subject matter; and, if this contract relates to rolling stock or equipment interchanged with other railroads the rolling stock or equipment of the Buyer may be repaired by other railroads irrespective of where the repair parts may be obtained, and the Buyer shall have the same right to use and/or vend such repair parts for the purpose of repairing foreign rolling stock or equipment received in interchange with other railroads. This agreement shall include the right on the part of the Buyer to purchase repair parts in anticipation of breakage instead of waiting until the breakage actually occurs before ordering the repair parts.

4. Seller agrees to indemnify the Buyer against all claims, damages, losses, costs and expenses, including attorney's fees, arising or growing out of patents and copyrights, and all royalties in connection therewith, and arising or growing out of the purchase and use by the Buyer of the subject matter of this contract.

5. The provisions hereof shall inure to the benefit of and be binding upon the principals, agents, personal representatives, successors and assigns of the Seller and the agents, successors and assigns of the Buyer.

SHIPMENTS:

6. All material must be marked or tagged with complete order number and requisition number and be accompanied by packing list in detail.

7. No charge for package or drayage will be allowed. Material must be packed in conformity with tariff classification requirements so as to secure lowest freight rate.

8. All shipments unless otherwise specified must move "Collect" from f. o. b. point.

9. When forwarding by express both package and express receipt must plainly indicate express routing desired.

10. Material should not be forwarded by Parcel Post unless you are specifically instructed to so handle.

11. Unless advised to the contrary, small lots under 100 lbs. should be consolidated with others for same destination to make freight shipments of 100 lbs. or more.

12. Shipments on this order which may originate off Southern Pacific Co. rails must be routed in accordance with instructions which must be obtained from our representative shown on face of this order.

13. In order that our material may move at lowest possible cost, shipments of less than minimum carload should only be made when material is such as is usually ordered in less than carload quantities or it is not reasonable to assume we could increase sufficiently to make minimum carload nor authorize consolidation of shipments for two or more destinations.

In all other cases before allowing less than a carload to leave your plant you should have authority for such action either from the office placing order or Traffic Representative to whom you were referred for routing.

When there are different rates on the same commodity depending on the carload minimum used, you should load to a minimum taking the lowest rate unless authorized as above to do otherwise.

INVOICES:

14. Invoices in quadruplicate, separately for each order, showing complete order and requisition number and accompanied by original signed bill of lading, shipping receipt, express receipt or other original signed receipt indicating delivery to our representative together with copy of inspection or test report if any required, should be forwarded to office placing order. Transportation charges included on invoices must be supported by signed paid copy of transportation bill.

15. We hereby certify: that the property ordered herein is to be physically incorporated into manufactured articles which are to be sold by us in the regular course of business; that such property is included within the property to be purchased by us from you in accordance with duly executed resale certificate hereby or heretofore furnished by us to you; and that in the opinion of our counsel this sale is not subject to tax under the California Sales and Use Tax Act or any Municipal Sales and Use Tax Acts.

MAXIMUM PRICES:

16. The Seller in accepting this order warrants to the Buyer and to the Office of Price Stabilization that prices to be charged do not exceed prices permitted by Office of Price Stabilization regulations.

203

Defendant's Exhibit J.

BEFORE FILING RETURN TO Defendant's Exhibit J AUDIT No. 219

DEPT. No. M 283 187

SOUTHERN PACIFIC EQUIPMENT COMPANY

STATEMENT OF ACCOUNT APPROVED FOR VOUCHER

6/13/51 113135 3061 $2,028.94

DEFENDANT'S EXHIBIT J
(3 pages)

AUG 1951

REGISTERED IN

TWO THOUSAND TWENTY-EIGHT & 94/100- - - - - - - - - - $2028.94

IN FAVOR OF

SOUTHERN PACIFIC CO.
% LOCAL TREASURER
65 MARKET ST.
SAN FRANCISCO 5, CALIF.

RECORDED IN FORMS 4212 OR 4935

FOR DISBT'S OFFICE

EXAMINED AND FOUND CORRECT IN ACCORDANCE WITH TERMS OF
AGREEMENT, AUDIT NO. OR DISBURSEMENTS NO.
SPUR TRACK DEPOSIT COLLECTED 19
CONTRACT CLERK DATE 19

CHARGEABLE TO

(P. 204)

7-50-75M

LbJ

106

BILL COLLECTIBLE

Bill No. 115135

Quote above number when remitting

ACCOUNTING DEPARTMENT
No. 1783 JUN 1951
CHARGED BY | FORM 4276 NO.

Month's Account May, 1951

Los Angeles General Stores Dept. No. LDS-427

Date Made June 13, 1951

To SOUTHERN PACIFIC COMPANY, Dr.

Southern Pacific Equipment Company
65 Market Street
San Francisco, California

MAKE REMITTANCE TO:
Southern Pacific Company,
CARE OF LOCAL TREASURER,
65 Market Street,
San Francisco 5, California

205

189

2 50 25M/Sets—S

C. S. 5734-B

STOREKEEPER'S TRANSFER REQUISITION AND INVOICE.

STOREKEEPER AT [illegible] NO. 15542

SHIP TO [illegible] DATE [illegible] 19 51

STORE [illegible] SECTION 15 AT [illegible] DIST. OR DIV. [illegible]

1ST SHIPMENT	DATE [illegible]-51	W/B 617	CAR NO. [illegible]-15513	STRAIGHT CAR / WAY CAR / HOUSE CAR
2ND SHIPMENT	DATE	W/B	CAR NO.	STRAIGHT CAR / WAY CAR / HOUSE CAR

QUANTITY REQUIRED	DESCRIPTION		QUANTITY SHIPPED	UNIT WEIGHT	TOTAL WEIGHT	PRICE	UNIT PRICE	AMOUNT	CLASS
52	[illegible]	1	52			15.46	[illegible]	803.92	12
		2							
	PT. ORIGIN ____ VIA ____ GR. WT. ____								
	FRT. RATE ____ % OVERHEAD ____ % STR. EXP. ____ % USE TAX ____								
[illegible]	[illegible] 18 [illegible]	1	[illegible]			15.46	[illegible]	803.92	12
		2							
	PT. ORIGIN ____ VIA ____ GR. WT. ____								
	FRT. RATE ____ % OVERHEAD ____ % STR. EXP. ____ % USE TAX ____								
		1						2028.14	
		2							
	PT. ORIGIN ____ VIA ____ GR. WT. ____								
	FRT. RATE ____ % OVERHEAD ____ % STR. EXP. ____ % USE TAX ____								
		1							
		2							

Defendant's Exhibit K

BEFORE FILING RETURN TO _____ AUDIT No 190

SOUTHERN PACIFIC EQUIPMENT COMPANY DEPT No MP-43

STATEMENT OF ACCOUNT APPROVED FOR VOUCHER

12-48-2M

For seven bills, per form S. 5114-, Detail of Voucher, attached

178,730.64

~~DEFENDANT'S EXHIBIT K~~

(3 pages)

IN FAVOR OF
Southern Pacific Company
c/o Local Treasurer
65 Market Street
San Francisco 5, California

REGISTERED IN September 1951

One hundred seventy-eight thousand seven hundred thirty & 64/100 - - - - - - - - - - - - - - - - - - 17 730.64

RECORDED IN FORMS 4212 OR 8935

FOR DISBT'S OFFICE

EXAMINED AND FOUND CORRECT IN ACCORDANCE WITH TERMS OF _____
AGREEMENT AUDIT NO _____ OR DISBURSEMENTS NO _____
SPUR TRACK DEPOSIT COLLECTED _____ 19
CONTRACT CLERK _____ DATE _____ 19

CHARGEABLE TO

ACCOUNT NO	TITLE OF ACCOUNT	
701-8	Equipment Unpledged	~~178,730 64~~ 166,098 53
727-L-3	Auditors Suspense - Debit	12,632 11

thirty - 6/100 - - -

AUG 1951

RE TERE N

TWO THOUSAND TWENTY-EIGHT & 94/100- - - - - - - - - - $2028.94

IN FAVOR OF

SOUTHERN PACIFIC CO.
% LOCAL TREASURER
65 MARKET ST.
SAN FRANCISCO 5, CALIF.

RECORDED IN FORMS 4212 OR 8935

FOR DISBT S OFFICE

EXAMINED AND FOUND CORRECT IN ACCORDANCE WITH TERMS OF
AGREEMENT, AUDIT NO. OR DISBURSEMENTS NO.
SPUR TRACK DEPOSIT COLLECTED 19
CONTRACT CLERK DATE 19

CHARGEABLE TO

ACCOUNT NO.	TITLE OF ACCOUNT	
701/8/L/6	EQUIP UNPLEDGED CONST MATL	2028.94

CHECKED
AUG 30 1951
AGAINST FORM 5100

8/29/51 L

DATE PREPARED

W. J. M.
SEP 13 1951

CERTIFICATIONS AND APPROVALS

ORIGINATING OFFICE

RECORDED IN FORMS 4212 OR 8935

I HEREBY CERTIFY THAT THE ABOVE ACCOUNT HAS BEEN EXAMINED AND FOUND CORRECT

(TITLE) For General Storekeeper

CALCULATIONS CORRECT

E

I HEREBY CERTIFY THAT THE ABOVE ACCOUNT IS CORRECT

APPROVALS

APPROVED

(TITLE) For President

APPROVED

(TITLE) CONSTRUCTION ENGINEER

DISBURSEMENTS OFFICE

EXAMINED BY

THIS ACCOUNT HAS BEEN EXAMINED AND FOUND CORRECT AS TO COMPUTATIONS

SEP 12 1951

FOR ASSISTANT GENERAL AUDITOR

292

Bill No. 115135

Quote above number when remitting

Month's Account May, 1951

Los Angeles General Stores Dept. No. LDS-427

Date Made June 13, 1951

To SOUTHERN PACIFIC COMPANY, Dr.

Southern Pacific Equipment Company
65 Market Street
San Francisco, California

MAKE REMITTANCE TO:
Southern Pacific Company,
CARE OF LOCAL TREASURER,
65 Market Street,
San Francisco 5, California

For reimbursement for value of material, including other costs incurred in connection therewith, transferred to your company at Sacramento, California, from our Los Angeles General Stores during month of May, 1951 per detail on forms 5734 attached; for building Freight Cars	$2,028.94

F.O.B. Los Angeles, California
Payment; 30 Days Net

DISTRIBUTION:

For further information address:
Auditor of Miscellaneous Accounts,
Southern Pacific Company,
65 Market Street,
San Francisco 5, California

PT. ORIGIN _____ VIA _____ GR. WT. _____
FRT. RATE _____ % OVERHEAD _____ % STR. EXP. _____ % USE TAX _____

18

PT. ORIGIN _____ VIA _____ GR. WT. _____
FRT. RATE _____ % OVERHEAD _____ % STR. EXP. _____ % USE TAX _____

PT. ORIGIN _____ VIA _____ GR. WT. _____
FRT. RATE _____ % OVERHEAD _____ % STR. EXP. _____ % USE TAX _____

PT. ORIGIN _____ VIA _____ GR. WT. _____
FRT. RATE _____ % OVERHEAD _____ % STR. EXP. _____ % USE TAX _____

PT. ORIGIN _____ VIA _____ GR. WT. _____
FRT. RATE _____ % OVERHEAD _____ % STR. EXP. _____ % USE TAX _____

S. D. EQUIPMENT CO.

PT. ORIGIN _____ VIA _____ GR. WT. _____
FRT. RATE _____ % OVERHEAD _____ % STR. EXP. _____ % USE TAX _____

PT. ORIGIN _____ VIA _____ GR. WT. _____
FRT. RATE _____ % OVERHEAD _____ % STR. EXP. _____ % USE TAX _____

PURPOSE

1				15.46		803	92	12
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MATERIAL RECEIVED
SOUTHERN PACIFIC CO.
PUR. AGT. GEN'L. STRPS. SACRAMENTO

Program 3061

APPROVED

SIGNED

7-50-75M NIG

SOUTHERN PACIFIC LINES

BILL COLLECTIBLE

Bill No. 1153.9

Quote above number when remitting

Month's Account July 1951

Sacramento General Shops Dept. No. 3-429

Date Made AUG 9 1951 19

To SOUTHERN PACIFIC COMPANY, Dr.

Southern Pacific Equipment Company
65 Market Street
San Francisco 5, California

MAKE REMITTANCE TO:
Southern Pacific Company.
CARE OF LOCAL TREASURER
65 Market Street.
San Francisco 5, California

ACCOUNTING DEPARTMENT
No. T 2733 AUG 16 51

NIG

192

C.S.-130-B

DETAIL OF BILL COLLECTIBLE

SACRAMENTO GENERAL SHOPS

Sheet No.

Dept. No. J-429

Audit No.

Payor SOUTHERN PACIFIC EQUIPMENT COMPANY

2733 AUG 1951

Sacramento General Shop Payroll Audit 181		$ 123,127.45	
Shop Expense - 6%		7,387.65	
" " 6%	Audit 178	6.61	
Los Angeles General Shop Inspectors Audit 178		110.19	
" " " " " " "		822.92	
Sacramento General Store Payroll Audit 163		252.06	
" " Shop " " 180		390.00	$ 132,096.88
2% Handling charge on material issued.			28,114.89
Month of June 1951 (By S.P. Co. Store forces.)			
S/O 2806 Material Issues	$ 112,420.47		
2807 " "	1,196,320.57		
2807 " "	96,958.40 (Additional May 1951)		
2808 " "	44.83		
	1,405,744.27		
			$ 160,211.77

COPY

Defendant's Exhibit M

411 036 JUL 8 - 1952

DE[redacted]T NO. M

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR

NUMBER 730

CERTIFICATE OF CONSENT TO SELF-INSURE

THIS IS TO CERTIFY, That SOUTHERN PACIFIC COMPANY has complied with the requirements of the Director of Industrial Relations under the provisions of Sections 3700 to 3705, inclusive, of the Labor Code of the State of California and is hereby granted this Certificate of Consent to Self-Insure.

This certificate may be revoked at any time for good cause shown.*

DATED AT SACRAMENTO, CALIFORNIA,

THIS 22d DAY OF OCTOBER 1947

DEPARTMENT OF INDUSTRIAL RELATIONS
OF THE STATE OF CALIFORNIA

PAUL SCHARRENBERG
DIRECTOR

DEPARTMENT OF INDUSTRIAL RELATIONS
STATE OF CALIFORNIA

SEAL

ATTEST:

ARNOLD SMITH
Supervisor of Self-Insured Employers

*Revocation of Certificate.—"A certificate of consent to self-insure may be revoked by the Director of Industrial Relations at any time for good cause after a hearing. Good cause includes, among other things, the impairment of the solvency of such employer, the inability of the employer to fulfill his obligations, or the practice by such employer or his agent in charge of the administration of obligations under this division of any of the following: (a) Habitually and as a matter of practice and custom inducing claimants for compensation to accept less than the compensation due or making it necessary for them to resort to proceedings against the employer to secure the compensation due; (b) Discharging his compensation obligations in a dishonest manner; (c) Discharging his compensation obligations in such a manner as to cause injury to the public or those dealing with him." (Section 3702 of Labor Code.)

FORM NO. 9. 98194 10-48 100

STATE PRINTING OFFICE

210

Defendant's Exhibit L

3016 | CHARLES GILEO | F CRMN W | 019330 | 181 | 3024 | 057 | 07 | 11 | 1

EMPL. ACCT. NO. | NAME | OCCUPATION | RATE | LOCATION | C.C. NO. | MO. | DAY | YR.

S.T. HOURS	O.T. HOURS	S.O. OR EQUIP. NO.	DESCRIPTION OF WORK
8		2807	Welding End's

TOTAL O.T.

CLAIM _____ rate for performing the following work:

Employe commenced and quit on overtime as claimed:

EXAMINED AND FOUND CORRECT: [signature]

CLAIM RATE _____ NO. _____

NAME _____

FROM _____ M. TO _____ M.

FROM _____ M. TO _____ M.

FIRST HALF SHIFT		SECOND HALF SHIFT		OVERTIME	
START	STOP	START	STOP	START	STOP
	11 08	11 30	7 30 PM		

H538

[signature] .M. [signature]

PLEASE DO NOT FOLD THIS TIME CARD

SOUTHERN PACIFIC COMPANY S-2339-F

IBM 767205

DAILY TIME CARD-M.P.&C.

PLEASE DO NOT FOLD THIS T

8		2807	Welding End's

[illegible] O.T.	TOTAL O.T.	CLAIM _____ rate for performing the following work:	Employe commenced and quit on overtime as claimed:
CLAIM RATE _____ NO. _____		FROM _____ M. TO _____ M.	EXAMINED AND FOUND CORRECT: [signature]
NAME _____		FROM _____ M. TO _____ M.	FOREMAN

FIRST HALF SHIFT		SECOND HALF SHIFT	
START	STOP	START	STOP
7538	11 02	11 30	2 30 pm

EMPLOYE SIGN HERE [signature]

IBM 767205 DAILY TIME CARD-M.P.&C.

PACIFIC COMPANY S-2339-F

ACTION No. 411036 DATE JUL 8 - 1952

DEFENDANT'S EXHIBIT NO. 4

[signature] Deputy Clerk

[fol. 300] DEFENDANT'S EXHIBIT N

Southern Pacific Equipment Company

Room 952, 65 Market Street, San Francisco 5, California

V. S. Andrus, President
Roy G. Hillebrand, Vice President

In reply please refer to P-3071

March 12, 1951

Order P-3071, placed with Pullman-Standard Car Manufacturing Company, hereinafter referred to as "builder," by the Southern Pacific Equipment Company, hereinafter referred to as "buyer", covering one thousand six hundred (1600) steel sheathed, wood lined box cars.

Pullman-Standard Car Manufacturing Company
c/o Mr. Mark Noble
Pacific Coast Sales Representative
2910 Russ Building
San Francisco 4, California

Gentlemen:

Confirming verbal advice, this will be your authority to build for the Southern Pacific Equipment Company One Thousand Six Hundred (1600) 100,000 pound capacity 40'6" Steel Sheathed Wood Lined Box Cars, Class B-50-28, with 100,000 pound capacity A-3 Type "Ride Control" Trucks of Grade "B" Cast Steel with 2½" Spring travel and Single Plate Bracketed Type Cast Iron Wheels, in accordance with the terms and conditions, etc. set forth in the following Exhibits which are attached to and form a part of this order:

Exhibit "A" —Cost Sheet
Exhibit "B" —Assignment Sheet
Exhibit "C-FO"—General Instructions

BILL COLLECTIBLE

Bill No. 115[illegible]9

Quote above number when remitting

Month's Account July 1951

Sacramento General Shops Dept. No. J-429

Date Made AUG 9 1951 19

No. 2733 AUG 16 51

To SOUTHERN PACIFIC COMPANY, Dr.

Southern Pacific Equipment Company
65 Market Street
San Francisco 5, California

MAKE REMITTANCE TO
Southern Pacific Company,
CARE OF LOCAL TREASURER,
65 Market Street,
San Francisco 5, California

For expense incurred at Sacramento General Shops on Program P-3061, P-3062 Southern Pacific Equipment Co. for fabricating and assembling material per detail on file in Auditor of Disbursements Office, Mechanical Bureau, month of June 1951.		
Detail attached.		$ 160,211.77

APPROVED FOR VOUCHER

F L Leaver

Construction Engineer

DISTRIBUTION:

1 3061- 157 [illegible]

2 3062- [illegible]

For further information address:
Auditor of Miscellaneous Accounts,
Southern Pacific Company,
65 Market Street,
San Francisco 5, California

8 1951 38

2% Handling charge on material issued.
Month of June 1951 (By S.P. Co. Store forces.)

S/O 2806	Material Issued	$ 112,420.47	
2807	" "	1,196,320.57	
2807	" "	96,958.40	(Additional May 1951)
2808	" "	44.83	
		1,405,744.27	

28,114.89

$ 160,211.77

Binding Margin

Delivery

Delivery of these cars to commence in the Second Quarter of 1952 and continue at the rate of 135 cars per week. Delivery is subject to delays caused by strikes, fires, accidents, delays of materials, men or carriers or other controversies unavoidable or beyond Builder's control.

Price

Builder's price named in the attached Exhibit "A" Cost Sheet is based on current labor wage rates, allowances and benefits such as paid vacations and holidays, Group Insurance Retirement Income plans and other benefits of similar nature and payroll taxes provided under existing laws, at Builder's Bessemer, Alabama plant under Union Contracts dated June 14, 1950 and August 18, 1950, as well as specialty prices listed in Exhibit "A" Cost Sheet and steel, lumber and other material prices delivered F.O.B. Bessemer, Alabama as of January 15, 1951.

[fol. 301] If the prices Builder is required to pay for specialties, steel, lumber and/or other materials from Builder's normal sources of supply or from other than Builder's normal sources, if necessary to use such sources to obtain materials, delivered at Builder's plant, are more or less than the prices in effect as of January 15, 1951 for all such materials except specialties, and specialties as shown in Exhibit "A" Cost Sheet, the price of the cars will be increased or decreased accordingly.

In the event, either as a result of negotiations with the union representing Builder's said employes or as a result of changes in laws affecting payroll taxes, the average effective rate of compensation per hour shall be changed by one cent or more, the amount of such change shall be determined and stated in cents per hour and the price of the cars will be increased or decreased by an amount equal to the product obtained by multiplying the amount shown below as the Manufacturing Cost Escalation per car by the actual amount (to the nearest one tenth of a cent) of such change in the effective rate of compensation expressed in cents per hour. The amount of such change in the effective rate of compensation above referred to

shall be determined and shall be certified by Arthur Young & Company, Auditors, Chicago, Illinois; and in such determination such Auditors shall consider, among other relevant matters: (a) all changes in hourly wage rates from those provided in present union contract, (b) all changes in production costs resulting from changes in allowances and benefits hereafter granted to said employes of character set forth above, and (c) all changes in payroll taxes paid by Builder as a result of change in existing laws or regulations.

In the event that any such increase or decrease in the effective rate of compensation shall become effective after the work of fabricating and construction of these cars shall commence, that portion of the work affected by such increase or decrease shall be determined and certified by said Arthur Young & Company, and the increase or decrease in effective rate of compensation shall apply only to that proportion.

The Manufacturing Cost Escalation per car will be at the rate of $6.62 for each one cent change in effective rate of compensation but such amount is based on building the cars in accordance with the base specifications, and is subject to adjustment for subsequent changes in specifications which involve an increase or decrease.

[fol. 302] It is understood that the cost of any services rendered by Arthur Young & Company as referred above will be wholly for the account of the Builder and that the Buyer reserves the right to make such further check as it may desire.

The Builder shall give the Buyer immediate notice of any change in wage rates, allowances or other benefits, and of any negotiations likely to result in such change, which might affect the cost of the equipment to the Buyer.

It is understood that no Steel or other materials will be obtained from other than Builder's usual mill sources or at prices higher than regular market prices without first obtaining authority from the Buyer, otherwise any increased cost resulting therefrom will be for the account of the Builder.

It is also understood that the Buyer reserves the right to make such check as it may desire of Escalation resulting

from any changes in material or Specialty Costs or Wage rates, allowances, etc. referred to above.

The Builder in accepting this order warrants to the Buyer and to the Office of Price Stabilization that price to be charged does not exceed price permitted by Office of Price Stabilization regulations.

Acceptance of Order

If you accept this order under all of the terms and conditions set forth in Exhibits "A," "B" and "C-FO" mentioned above, please sign one copy of the order as accepted and return to the undersigned.

Yours truly, Southern Pacific Equipment Company,
(Signed) V. S. Andrus, President.

Accepted: Pullman-Standard Car Manufacturing Company, by ——— ———.

[fol. 303] Exhibit "A" to Exhibit N

Cost Sheet

Forming Part of Order No. P-3071, Dated March 12, 1951

Placed with

Pullman-Standard Car Manufacturing Company

One Thousand Six Hundred (1600) Class B-50-28 Steel Sheathed Wood Lined 100,000 pound capacity Box Cars, with A-3 "Ride Control" Trucks of Grade "B" Cast Steel with 2½" Spring Travel and Single Plate Bracketed Type Cast Iron Wheels.

Item No.				Per Car Add	Per Car Deduct	Total Per Car
1.	Base Price including Specialties per your quotation 1-23-51 as subsequently amended.					$5,534.24
	Following Specialties Included in.					
	Base Price	At	Changed To	At		
	Air Brakes–Incl. Wabcoseal Pipe Fittings	298.85				
	Anchors–Brake Pipe	2.75	Correct Price	2.85	.10	
	Axles	204.13				
	Beams–Brake	60.40	Unpainted	59.00		1.40
	Bearings–Journal	69.92	Correct Price	70.00	.78	
	Bearings–Roller Side	12.95				
	Boards–Running with Brake Steps	69.00	375 Car Sets of Morton at 66.23 and 125 Car Sets of Morton at 72.43, 500 Car Sets of Gypsum at 68.21, 300 Car Sets of Kerrigan at 57.94 and 300 Car Sets Transportation Specialties Co. at 65.45	65.64		3.36
	Bolsters–Truck	257.80				
	Brakes–Hand	33.00				
	Connections–Truck Lever	8.36				

[fol. 304]

Item No.	Following Specialties Included in Base Price	At	Changed To	At	Per Car Add	Per Car Deduct	Total Per Car
	Control Parts–Ride	33.50	Correct Price	36.50	3.00		
	Couplers	139.45					
	Doors–Steel Side with Fixtures and Fasteners	215.09	Superior with Ball Bearing Fixtures	210.50		4.50	
	Ends–Corru. Steel	223.50	Correct Price	216.60		6.90	
	Frames–Truck Side	403.60					
	Retainer–Waste	4.17	Correct Price	4.05		.12	
	Gears–Draft	142.50					
	Guards–Dust	1.53					
	Hangers–Brake	9.02					
	Levers–Truck	10.16					
	Lids–Journal Box with Pins	14.80	500 Car Sets of Nati. Mall. at 17.90, 500 Car Sets of Alco at 13.76, and 600 Car Sets of Symington at 16.00 Car Set	15.89	1.09		
	Lockeyes–Brake Shoe	1.54					
	Packing–Spring	4.17	Correct Price	7.25	3.08		
	Plates–Brake Hanger	6.32					
	Plates–Floor	37.00	Correct Price	34.75		2.25	
	Plates "W" Side	65.00	Correct Price	63.35		1.65	

[fol. 305]

Item No.				Per Car Add	Per Car Deduct	Total Per Car
	Following Specialties Included in Base Price	At	Changed To	At		
	Receptacles–Defect Card	.75	Correct Price	.72		.03
	Retainer–Draft Key	.86	Correct Price	.80		.06
	Rigging–Coupler Release	7.25				
	Roofs	246.00	Correct Price	245.10		.90
	Shoes–Brake	11.74				
	Springs	52.00	Correct Price	52.79	.79	
	Support–4 Point	26.52	Correct Price	25.27		1.25
	Wheels	301.51				
	Yokes–Coupler	52.20				
	PAINT					
	Red Lead Paint 2½ Gal. @ 6.25 Gal.	15.63				
	Metallic Primer 11 Gal. @ 2.35 Gal.	25.85				
	Freight Car Paint 17 Gal. @ 1.50 Gal.	25.50				
	Galv. Primer ¾ Gal. @ 4.00 Gal.	3.00				

[fol. 306]

Item No.		Per Car Add	Per Car Deduct	Total Per Car
2.	Average Application add of 2.76 Car Set for 300 C. S. Transportation Specialties Co. Running Boards and 300 C. S. Kerrigan Running Boards, and deduct of 1.25 Car Set on 500 Car Sets U. S. Gypsum Running Boards.	.64		
3.	Account Alternate Lumber specified in Order Based on following lumber allowances: 405 Ft. Yellow Pine Framing at 122.75 M' 990 Ft. " " Decking at 123.50 M' 1130 Ft. " " Lining at 178.75 M' 20 Ft. " " Cardboards at 178.75 M'		10.06	
4.	Cost of inspection, etc. for which Southern Pacific Equipment Company will render invoice against you.	13.00		
	Total Additions	22.48		
	Total Deductions		32.48	
	Net Deduction			10.00
	Net Price, F. O. B. Tracks of Connecting Trunk Line Railroads, Bessemer, Alabama.			$5,524.24

Dated March 12, 1951.

[fol. 307] EHIBIT "B" TO EXHIBIT N

Assignment Sheet

Forming Part of Order No. P-3071, Dated March 42, 1951

Placed with

Pullman-Standard Car Manufacturing Company

One Thousand Six Hundred (1600) Steel Sheathed Wood Lined Box Cars, Class B-50-28, in accordance with Specification No. C. S. F.-329-K marked on cover. "Revised November 10, 1949" and other specifications and drawings referred to therein, except construction to be modified so that cars will be similar to cars being constructed on Order P-3064 including high tensile low alloy steel underframes with open hearth steel side and end sills as outlined in Builder's letter of June 28th, 1948 referring to Order P-3055.

Construction to be further modified to cover cars 10 ft. high and 9 ft. 4 inches wide with 7 ft. door openings.

1. Lumber: Following to be Southern Yellow Pine to A. A. R. Specifications:

Lining to Paragraph 56 and 59
Decking to Paragraph 57 and 58
Framing to Paragraph 65 and 69

2. Floor Bolts: Floor Bolts to be Commercial Flathead Type Carriage Bolts. Bolts to have Grip Nut Company's No. 2 Grip Holding or MacLean-Fogg "M-F" No. 2 Speed Holding Nuts.

[fol. 308] Lettering and Numbering

600 Cars.

Lettering: Southern Pacific.

Car Numbers: 107100 to 107699, both inclusive.

1000 Cars.

Lettering: Southern Pacific, T&NO.

Car Numbers: 61250 to 62249, both inclusive.

Wheel Numbers: Wheel manufacturers regular wheel numbers.

The following specialties are to be furnished and applied to cars by Car Builder:

Note: Wherever more than one Brand of Specialty is specified a proportionate quantity of each type is to be applied to both SP and T&NO Cars, except that the entire 1000 car sets of New York AB Brakes are to be applied to T&NO Cars.

[fol. 308]

Specialty	Manufactured By	Drawing or Schedule Reference
Air Brake Equipment (AB) Incl. Wabcoseal Pipe Fittings	600 Car Sets Westinghouse A. B. Co. 1000 Car Sets New York A. B. Co.	SSF-1-Q
Anchors-Brake Pipe 2¼" Hole (5 per set)	Central Ry. Supply Co.	3026-D
Axles-(Residual Alloy Test Waived)	Columbia Steel Co. (TCI)	AF-3111-G
Beams-Brake #18 Positive	(800 Car Sets (Chicago Malleable Castings Co.	H-830-A
Bearings-Journal	Magnus Metal Corpn.	BF-32553-J
Bearings-Roller Side Two Rivet Type #656-C	A. Stucki Co.	AF-32357-A

[fol. 309]

Boards-Steel Running Complete with Brake Step 12 Ga. C. B. Galv.	(500 Car Sets (Morton Mfg. Co.	(5432-1 & (4598-6
	(500 Car Sets (U. S. Gypsum Co.	(25271 & (25049-S-2
	(300 Car Sets (Kerrigan Iron Works	(EHW-11750-1 (EHW-11750-2
	(300 Car Sets (Transportation Specialties Co.	
Bolsters-Truck Grade "B" Cast Steel-For A-3 Ride Control Truck (Center Plates not Ground, but must be smooth.)	(600 Car Sets (American Steel Fdrys.	69997-B
	(1000 Car Sets (Scullin Steel Co.	T-6417-D
Brakes-Hand Mechanism, Vertical, Wheel-AAR Certified	(300 Car Sets (Klasing Hand Brake Co.	
	(500 Car Sets (Equipment Specialties Divn of (Union Asbestos & Rubber Co.	3749-C
	(500 Car Sets (The Orme Co. (Champion-Peacock)	HA-108-D
	(300 Car Sets (Superior Hand Brake Co.	737-B
Connections-Truck Lever	Schaefer Equipment Co.	858-B
Couplers-6¼" x 8" Rigid Shank Rotary Bottom Operating Grade "B" Cast Steel with High Tensile Steel Locks and Knuckles	(475 Car Sets (National Malleable & Steel Cast. Co.	BF-31492-F
	(500 Car Sets (McConway & Torley Co.	BF-31492-F
	(625 Car Sets (American Steel Foundries	BF-31492-F
Doors-Steel Side-with Fixtures for 7 foot Clear Door Openings in cars 10 ft. high	(1600 Car Sets of N. A. X. #16 Ga. High Tensile Steel with Ball Bearing Fixtures (Superior Car Door Co.	Similar to 16904
Ends-Dreadnaught O. H. Steel	Standard Ry Equipment Co.	5E-7927-C
Frames-Truck Side Grade "B" Cast Steel without Waste Retaining Ribs for A-3 Ride Control Truck	(600 Car Sets (American Steel Fdrys	70027-C
	(1000 Car Sets (Scullin Steel Co.	I-6112-G

[fol. 310]

Gears-Draft	(125 Car Sets (Peerless Equipment Co.	H-1-B2
	(475 Car Sets	

Specialty	Manufactured By	Drawing or Schedule Reference
	(W. H. Miner, Inc.	A-22XL
	(500 Car Sets	
	(Waugh Equipment Co.	
	(500 Car Sets	
	(Hulson Co.	* 202
Guards–Dust, Leather Fibre	Ajax Consolidated Co.	101
Hangers–Brake	Schaefer Equipment Co.	AF-32914-D
Levers–Truck—7" x 14"	Schaefer Equipment Co.	1018-A
Levers–Truck—5" x 10"	Schaefer Equipment Co.	1049
Lids–Journal Box, with Pins	(500 Car Sets	
	(Natl. Mall. & Steel Cast. Co.	"FLEXO 4"
	(500 Car Sets	
	(American Locomotive Co.	M-562-A
	(600 Car Sets "	
	(Symington Gould Corpn.	P-810-A
"Lockeys"–Brake Shoe	American Brake Shoe & Fdry. Co.	BF-32757-B
Packing–Spring, 18# per car	Spring Packing Corpn.	
Plates–Body Center	Pullman-Standard Car Mfg. Co.	518-T-41-G
Plates–Brake Hanger Wearing (W-1)	Schaefer Equipment Co.	BH-32354
Plates–Steel Floor at Doorway, 1/8" O. H. Steel for Cars 9' 4" Wide	Standard Ry. Equipment Co.	4F-7938-C
Plates–"W" Section Side, (S-244-Y) 3/16" O. H. Steel	Standard Ry. Equipment Co.	7W-7986-B
Receptacles–Defect Card (Cheaper)	Western Ry. Equipment Co.	BF-32369-A
Retainers–Positive Draft Key	Illinois Ry. Equipment Co.	BF-33182-B
Retainer–Waste	Modern Railway Devices Inc.	CF-34477
[fol. 311]		
Ride Control Parts	American Steel Foundries	56834-A
Rigging–Coupler Release	Standard Ry. Equipment Co.	1U-8016-C
Roofs–Solid Steel No. 14 Ga. O. H. Galvanized Steel	Standard Ry. Equipment Co.	7R-7931-B & 7R-7964-A
Shoes–Brake AAR Duplane Back	American Brake Shoe & Fdry. Co.	BF-32137-B
Springs 2½" Travel per AAR D-35 for ASF A-3 Ride Control Trucks	(1250 Car Sets	
	(American Locomotive Co.	
	(350 Car Sets	
	(H. K. Porter Co.	
20 Outer Coils–5½" x 9-1/16"	x 1-1/16"	AF-33550-B
8 Inner Coils–3¼" x 9-1/16"	x 21/32"	AF-33549-B
Supports–Brake Beam, 4 Point For ASF A-3 Ride Control Trucks	Chicago Ry. Equipment Co.	13150-1-C
Wedges–Journal Bearings, Drop Forged	Pullman-Standard Car Mfg. Co.	BF-3619-G
Wheels, 750# Cast Iron–Single Plate, Bracketed Type	Southern Wheel Divn. American Brake Shoe Co.	AAR Design
Yokes–Coupler Grade "B" Cast Steel–Rigid Type Pattern Y-40	(600 Car Sets	BF-32070-A
	(Allied Steel Castings Co.	
	(350 Car Sets	
	(Symington Gould Corpn.	
	(400 Car Sets	
	(McConway & Torley Co.	
	(250 Car Sets	
	(Buckeye Steel Castings Co.	

Dated March 12, 1951.

[fol. 312] EXHIBIT "C-FO" TO EXHIBIT N

Forming part of Order No. P-3071, dated March 12, 1951.

Placed with Pullman-Standard Car Manufacturing Company.

1. Specifications and Drawings

See Exhibit "B", Assignment, attached to and forming a part of this order.

2. Lumber

Builder will purchase the Douglas Fir Lumber needed in the construction of the cars covered by this contract from mills located on Southern Pacific Lines, and Yellow Pine Lumber needed from mills located on Lines of the Texas and New Orleans Railroad Company, and will subsequently inform the Buyer the names and locations of the mills, and the reduction in price, if any, that will be made if the Buyer should waive the foregoing obligation covering the purchase of lumber. *The Builder in sending out invitations for prices must include representative producing mills located on lines of Southern Pacific and Texas and New Orleans Railroad Company.* It is understood that on an equality of rates the Builder agrees to route the lumber purchased as may be directed by Buyer. *Simultaneously with the placement of orders to the mills, Builder will inform the Buyer the names and locations of said mills, with footage ordered for each.* In obligating itself to purchase the lumber in the manner above described it is the desire of the Buyer that Southern Pacific Company and Texas and New Orleans Railroad Company earn the revenue from the carriage of [fol. 313] the lumber; nevertheless there are considerations, other than earnings resulting from the carriage of the lumber, which also influence Buyer's desire that the lumber be purchased from mills located on the lines of these two Railroads, and it is agreed that the last named consideration is a governing one in the making of this contract. If, for any reason, however, the Builder is unable to comply with the purchasing clause of these specifications, Buyer will, on request, consider the waiving of this requirement, but unless such waiver is obtained in writing a breach of

the purchasing clause will be a valid cause for the cancellation of the contract.

3. Routing

Please apply to Mr. C. T. Collett, 310 South Michigan Avenue, Chicago, Illinois, for routing instructions for cars covered hereby. Material or equipment covered by this order must not be shipped until routing instructions have been obtained from Mr. Collett, or his authorized representative.

Buyer shall have the right to route all materials, including specialties, that are to be used in the construction of these cars.

4. Correspondence

In order that the building of these cars may be expedited all possible, all correspondence relating to commercial and mechanical matters is to be conducted between the Builder's office and Mr. G. M. Betterton, Room 952, 65 Market Street, San Francisco 5, California. All letters should be in *duplicate*.

5. Specialties

It is understood the Builder will purchase all of the specialties listed on Assignment Exhibit "B".

[fol. 314] 6. Patent Claims and Royalty Charges

Except in the case of devices or construction specified by the Buyer to be used in the building of this equipment or articles and things designated by the Buyer to be purchased from named individuals or companies, the Builder will indemnify and save the Buyer harmless from any judgment for damages and costs which may be rendered against the Buyer in any suit made or brought against the Buyer on account of the infringement by the materials, per se, supplied by the Builder under this purchase order of any United States Patent; provided prompt written notice be given the Builder of the bringing of any such suit and an opportunity be given the Builder to settle or defend the same as the Builder may see fit and provided further that

every reasonable assistance which the Builder may require in any such suit be rendered to the Builder by the Buyer. The Buyer agrees to indemnify and save the Builder harmless against any claim arising out of the manufacture, use or sale of devices or construction specified by the Buyer to be used in the building of these locomotives or articles and things designated by the Buyer to be purchased from named individuals or companies. The Builder agrees to give prompt notice in writing, to the Buyer of any claim upon which the Buyer may be charged with liability hereunder.

Builder in placing its order to purchase any specialties or materials specified by the Buyer shall include in such order a provision substantially as follows:

[fol. 315] "Seller agrees to indemnify the Builder and/or Southern Pacific Equipment Company and their respective successors and assigns against all claims, damages, losses, costs and expenses, including attorneys' fees arising or growing out of patents and copyrights, and all royalties in connection therewith, arising or growing out of the purchase and use by the Builder and/or Southern Pacific Equipment Company and their respective successors and assigns of the subject matter of this contract."

7. Inspection

It is understood that Mr. B. M. Brown, 65 Market Street, San Francisco 5, California, will have charge of all matters pertaining to inspection and workmanship in connection with the cars covered by this order, and all communications in regard to such matters should be mailed to him direct. Builder will be held responsible for all materials purchased by it as such materials will *not* be inspected by the Buyer at point of origin.

Two copies of all Builder's orders placed for specialties and materials for these cars are to be sent to Mr. B. M. Brown, and one priced copy of each order is to be sent to Mr. G. M. Betterton. All such materials subject to inspection by the Buyer's Inspector at Builder's plant.

Builder shall obtain from Supplier and furnish to the Buyer three copies of Mill Test Reports covering all forgings, castings and rivets. Two copies to be sent to Mr.

B. M. Brown and one copy to be furnished to Buyer's Chief Inspector at Builder's plant.

Cars covered by this order must not be shipped until released by Mr. B. M. Brown or his authorized representative.

[fol. 316] 8. Assignment Sheet, Exhibit "B"

Assignment Sheet, Exhibit "B," is to be followed in all particulars and where it may conflict with specifications or drawings, the Assignment Sheet, Exhibit "B," is to be followed.

9. Mechanical Details

See Exhibit "B."

Builder will incorporate as many of the Buyer's Common Standard details as is consistent with proper design, making only such departures from the prints furnished by the Buyer as may be absolutely necessary.

10. Change in Design

In event departures from Common Standard prints and specifications furnished by the Buyer seem necessary, same are not to be made without the approval of Mr. G. M. Betterton.

11. Safety Appliances.

It is understood that Builder's price includes all safety appliances in accordance with Interstate Commerce Commission order dated March 13, 1911, and any and all amendments or supplements thereto, and also includes proper location of couplers above rail; and any other attachments or arrangements which may be required to make the cars and trucks acceptable to the road receiving same for shipment.

12. Bureau of Explosives

It is understood that Builder's price includes making interior of car *smooth* and that the car will conform to the regulations of the United States Bureau of Explosives.

[fol. 317] 13. Ownership Plates

If ownership or trust plates are required, they will be furnished and applied by the builder without any additional charge.

14. Lettering and Numbering

Cars and trucks will be lettered and numbered in accordance with the Assignment Sheet, Exhibit "B," and blueprints and specifications furnished.

15. Weighing of Cars and Notice of Shipment

It is understood that Builder's price includes weighing of cars strictly in accordance with latest American Railway Association Code of Rules. As these cars are completed and shipped builder will advise Mr. G. M. Betterton by telegram each Friday night the number of cars completed and shipped during the current week, Monday to Saturday inclusive. Weekly confirmation is to be made by letter in duplicate, listing the car numbers, date of shipment, light weight and wheel numbers of each car.

16. Tracings—Drawings

Builder agrees, for and in consideration of receiving this order to prepare on Buyer's common standard sizes of tracing cloth, any new or additional tracings to fully and properly illustrate these cars and trucks. These new or additional tracings will be furnished to the Buyer *upon completion of the first car.* Builder further agrees to prepare and furnish these new or additional tracings to the Buyer without any charge whatsoever.

[fol. 318] 17. Van Dyke Negative Prints.

Buyer does *not* agree to furnish free of charge Van Dyke negative prints or blueprints of any drawings in connection with cars covered by this order.

18. Photographs

Builder will furnish 3 sets photographs of completed cars to Mr. G. M. Betterton, Room 952, 65 Market Street, San Francisco 5, California. Each set to consist of following:

(a) Necessary views showing construction at various stages to illustrate assembling of underframe, sides and roof.

Completed Car

(b) Trucks
(c) Side elevation of car
(d) Elevation A end
(e) Elevation B end
(f) Roof
(g) Interior of Car

These photographs should be furnished as soon as consistent after completion of sample car.

19. Taxes

Buyer agrees to pay the amount of any sales tax, gross receipts tax, use or occupation tax, excise tax, or other similar tax (other than State or Federal Income and Excess Profits Taxes) payable upon this transaction and/or upon any sale, contract, shipment or delivery incident thereto (not including any such tax payable upon the Builder's purchases of parts and materials from its sub-contractors [fol. 319] which has been included in the estimate of cost upon which the price herein stated is based), or to furnish the Builder with necessary funds for such payment if payable by the Builder, in addition to the purchase price herein stated.

20. Payment

Payment for those cars will be made through the San Francisco office of the Buyer on the twenty-fifth (25th) day of each month, for cars inspected, accepted and shipped during the previous month.

21. Invoices, Bills of Lading and Certificates of inspection

Instructions regarding this will be furnished later.

[fol. 320] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 321] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 322] In Supreme Court of California

San Francisco County

San Francisco No. 19090

Hon. Clarence W. Morris, Judge.

Superior Court No. 411036

Charles M. Gileo, Plaintiff & Respondent

vs.

Southern Pacific Company, Defendant & Appellant

For App: Dunne, Dunne & Phelps, 333 Montgomery Street, S. F. 4.

For Resp: Hildebrand, Bills & McLeod, D. W. Probst, 1212 Broadway; Oakland 12.

Docket Entries

June 23, 1954. Hearing Granted. April 28, 1954 Judgment Reversed, Division Two.

Nov. 1, 1954. Ordered on Bank Calendar, San Francisco, Dec. 6, 1954.

Nov. 24, 1954. Filed So. Pac. Co. memo of oral argument.

Dec. 6, 1954. Causes called. Arthur B. Dunne argued for appellant and respondent Southern Pacific Co. in all 5 cases. Mr. Hildebrand and Mr. Probst argued for respondent Gileo in S.F. 19090. Mr. Perkins argued for appellant Eufrazio in SAC 6522. Mr. Colley argued for appellant Moreno in SAC 6520 and for respondent Aranda in SAC 6521. Mr. Scalora waived oral argument for appellant Eelk in SAC 6523. Submissions Deferred.

April 29, 1955. Submitted.

April 29, 1955. Judgment is affirmed. Gibson, C. J. We Concur: Shenk, J., Edmonds, J., Carter, J., Traynor, J., Schauer, J.

May 31, 1955. Remittitur issued.

[File endorsement omitted.]

[fols. 323-324] Order Due June 26, 1954.

1st District, Division 2, Civil No. 15612

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA, IN BANK

[Title omitted]

ORDER GRANTING HEARING AFTER JUDGMENT BY DISTRICT COURT OF APPEAL

Respondent's petition for hearing Granted and cause transferred to this court.

Gibson, Chief Justice; Shenk, J., Carter, J., Traynor, J.

[fol. 325] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA, IN BANK

S. F. 19090

CHARLES M. GILEO, Plaintiff and Respondent,

v.

SOUTHERN PACIFIC COMPANY, a Corporation, Defendant and Appellant

OPINION—April 29, 1955

Plaintiff was employed by defendant, a common carrier by railroad, when he was injured while working on the construction of new railroad cars. In this action, which was brought under the Federal Employers' Liability Act, the

parties stipulated to the existence of negligence and the amount of plaintiff's damages. The sole question left for determination was whether the act was applicable. The trial court concluded that plaintiff was entitled to the benefits of the act, and defendant has appealed from the ensuing judgment.

In February 1951, after being employed by defendant for ten years to repair railroad cars already in service, plaintiff began working as a carman welder on the construction of new cars. The cars were being built in accordance with a resolution adopted by defendant's board of directors [fol. 326] which provided for the acquisition of 5,000 new cars and for their assignment to defendant and a subsidiary, the Texas and New Orleans Railroad Company. Another subsidiary, the Southern Pacific Equipment Company, undertook the construction of 2,000 of the units, including 1,000 gondola cars allotted to the Texas Company. Defendant supplied the labor and shop facilities, paid the workmen and billed the equipment company for labor and certain other maintenance costs. The gondola cars, when completed, were to be shipped out of state and leased to defendant, which, in turn, was to sublease them to the Texas Company. Plaintiff was injured in July of 1951 while "welding corners" on one of the gondola cars.

In the shop where plaintiff worked there was a department for repairs and another for new construction, and positions in both departments were filled from the same seniority list. Every day some of the employees ordinarily engaged in making repairs were placed on new construction in order to offset vacancies created by absenteeism. Men on new construction could be transferred to repair work, and this was done on a few occasions, but plaintiff worked exclusively on new construction after being assigned to it.

The Federal Employers' Liability Act provides in part: [fol. 327] "Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, ma-

chinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." (53 Stats. 1404; 45 U. S. C. A. § 51.)

It is the position of defendant that it is not liable under the act unless it can be said that in manufacturing railroad cars it was engaging in interstate commerce. This argument overlooks the effect of the second paragraph of the section quoted above, which was added by amendment in 1939. Under that paragraph, plaintiff is considered to have been employed by defendant in interstate commerce and is [fol. 328] entitled to the benefits of the act if his duties were in the furtherance of such commerce or affected it in any way "directly or closely and substantially." (Ericksen v. Southern Pacific Co., 39 Cal. 2d 374, 378.)

The 1939 amendment was enacted to include injured employees previously excluded and to eliminate confusion and hardship to which they were subjected in choosing whether to bring suit under state or federal law. (See Shelton v. Thomson, 148 F. 2d 1; Wright v. New York Cent. R. Co., 33 N. Y. S. 2d 531; Ermin v. Pennsylvania R. Co., 36 F. Supp. 936, 940; Sen. Rep. No. 661, 76th Cong., 1st Sess. (1939).) In order to effectuate the purposes of the amended act, all doubt should be resolved in favor of its applicability. (See Lewis v. Industrial Acc. Com., 19 Cal. 2d 284, 286.)

The duties of plaintiff were at least as intimately connected with interstate commerce as those involved in a number of cases where the act, as it now reads, has been applied. (Shelton v. Thomson, 148 F. 2d 1 [operating a crane, located in a storehouse, to lift freight car wheels used to repair cars, including some which moved in interstate commerce]; Brainard v. Atchison, Topeka & Santa Fe Ry. Co., 87 F. Supp. 921 [assembling railroad switches and "frogs" later to be installed on lines of track, including the main line carrying interstate commerce]; Agostino v.

[fol. 329] Pennsylvania R. Co., 50 F. Supp. 726 [constructing new tracks to replace existing tracks used in interstate commerce]; Ericksen v. Southern Pacific Co., 39 Cal. 2d 374 [inspecting lumber for fitness as railroad ties, some of which would cross state lines and would be used in repairing tracks carrying interstate traffic]; Southern Pac. Co. v. Ind. Acc. Comm., 19 Cal. 2d 283 [repairing a freight car used in interstate and intrastate commerce]; Wills v. Terminal R. Ass'n of St. Louis [Mo. App.], 205 S. W. 2d 942 [installing a ventilating pipe in the roof of a building in which iron parts were forged for use in repairing equipment, including some used in interstate commerce]; Trucco v. Erie R. Co. [Pa.], 45 A. 2d 20 [constructing "strap hangers" used to replace parts in engines, some of which were devoted to interstate commerce]; Jordan v. Baltimore & Ohio R. Co. [W. Va.], 62 S. E. 2d 806 [laying tile in a sewer which, when finished, was to be connected to a "roundhouse" where engines moving in interstate commerce were serviced].)

Before the broad language now appearing in the act was added by the amendment in 1939, some decisions indicated that there was a distinction between an employee repairing equipment already operating in interstate commerce and one constructing equipment later to be used in that commerce, and it was held that the latter did not have federal coverage. (New York Central R. R. Co. v. White, 243 U. S. [fol. 330] 188, 192; Raymond v. Chicago, Mil. & St. P. Ry. Co., 243 U. S. 43, 45; see Pedersen v. Delaware, Lack. & West. R. R. Co., 229 U. S. 146, 152.) The only case decided after 1939, however, in which such a distinction was applied is Moser v. Union Pac. R. Co. (1944) [Ida.], 147 P. 2d 336, where a divided court held that an employee working on the construction of four miles of new track was not covered by the act. We cannot agree with the reasoning of the majority opinion in the Moser case. Under the language added by the amendment, an employee of a common carrier by railroad is entitled to the benefits of the act if his duties further interstate commerce or affect it in any way "directly or closely and substantially," regardless of whether the work which he is doing may be classified as new construction or repairs. The cars on which plaintiff was working were

intended to be used in interstate commerce, and it is clear that the construction of the cars furthered such commerce.

The judgment is affirmed.

Gibson, C. J.

We concur: Shenk, J., Edmonds, J., Carter, J., Traynor, J., Schauer, J.

[fol. 331] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

S. F. No. 19090

CHARLES M. GILEO, Plaintiff & Respondent

vs.

SOUTHERN PACIFIC COMPANY, Defendant & Appellant

On appeal from the Superior Court in and for the City and County of San Francisco

Superior Court No. 411036

JUDGMENT—April 29, 1955

The above entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered,

It is ordered, adjudged, and decreed by the Court that the Judgment of the Superior Court in and for the City and County of San Francisco in the above entitled cause, be and the same is hereby affirmed.

Respondent to recover costs on appeal.

I, William I. Sullivan, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 29th day of April, 1955, and now remaining of record in my office.

Witness my hand and the seal of the Court, affixed at my office, this 31st day of May, A.D. 1955.

William I. Sullivan, Clerk, By Paul Dinoia, Deputy.

[fol. 332] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 333] Certificate re Exhibits—Omitted in Printing

[fol. 334] [File endorsement omitted]

In the District Court of Appeal, State of California, First Appellate District, Division Two

[Title omitted]

Request for Certified Transcript of Record—Filed July 5, 1955

To: Walter S. Chisholm, Esq., Clerk of the District Court of Appeal of the State of California, First Appellate District:

Southern Pacific Company, defendant and appellant herein, intends to file a petition in the Supreme Court of the United States for a Writ of Certiorari to review the Judgment of the Supreme Court of the State of California in this cause and, accordingly, it respectfully requests that a certified transcript of all the proceedings in this cause in this Court, including but not restricted to, the Order of this Court submitting the cause and the Judgment and Opinion of this Court and all other Orders of this Court be made up and certified by the Clerk of this Court under the seal of [fol. 335] this Court as required by Rule 21(1) of the Revised Rules of the Supreme Court of the United States and thereupon be forwarded to the Clerk of the Supreme Court of the State of California to accompany the record herein in the Supreme Court of the State of California certified to by the Clerk thereof and forwarded by him to the Supreme Court of the United States.

San Francisco, California, June 14, 1955.

A. B. Dunne, Dunne, Dunne & Phelps, Attorneys for Defendant, Appellant and Petitioner.

[fol. 336] DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE FIRST APPELLATE DISTRICT, DIVISION Two

ARGUMENT AND SUBMISSION—January 12, 1954
San Francisco, California

Court met at 10 o'clock A.M. in its courtroom in the State Building on its January 1954 Motion and Term Calendar. Present: Nourse, P.J., presiding; Dooling, J.; Kaufman, J.; Elkington, Deputy Clerk; Richardson, Acting Reporter; Richardson, Bailiff.

Term Calendar

GILEO vs. SOUTHERN PACIFIC CO.
15612

Cause called and argued by Arthur B. Dunne, Esq., counsel for appellant, and by Sheridan Downey, Jr., counsel for respondent. Ordered cause submitted.

[fol. 337] [File endorsement omitted]

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION TWO

CHARLES M. GILEO, Plaintiff and Respondent

vs.

SOUTHERN PACIFIC COMPANY, a corporation, Defendant and Appellant

Civil No. 15612

OPINION—Filed April 28, 1954

This is an appeal from a judgment of $7000 awarded to plaintiff Gileo for injuries suffered while working as a carman welder for defendant railroad. Plaintiff's action was based on Federal Employers' Liability Act (45 USC §51).

Southern Pacific (SP) following World War II undertook a program of acquiring new equipment. Some of

the equipment was to go to an SP subsidiary, the Texas & New Orleans Railroad Company (T & NO). In August of 1950 the Board of Directors of SP adopted a resolution to acquire 5000 units of freight train equipment. Some of the equipment was assigned to SP and some to T & NO. Included in the assignment to the latter were 1000 gondola freight cars (gons). The gons were to be built in the SP shops at Sacramento. The Southern Pacific Equipment Company (SPEC) determined to build 2000 of the units including the 1000 gons assigned to T & NO. The SPEC purchased the necessary materials and entered into a contract with SP under which SP agreed to supply the shop facilities and labor. The labor force worked for SP. SP paid them and billed SPEC for such labor costs.

The SPEC contracted with George Smith and H. J. Wylie, purchasers, to construct, sell and deliver the cars to them. The purchasers then assigned the contract to the Pennsylvania Company for Banking and Trusts pursuant to an agreement made by Smith and Wylie with the Pennsylvania Banking Company and the SP. The Bank [fol. 338] was trustee of the Southern Pacific Company Equipment Trust. The SPEC billed the Bank and transferred title to it as trustee.

The Bank then leased the equipment to the SP or to T & NO, as the case might be.

At Sacramento SP has general shops separate from the operating or transportation division. One of these general shops was car shop No. 9, and the new cars were to be constructed there.

Construction began on July 1, 1950. The car shop was divided into two departments, one doing repair work and the other doing new car construction.

The new car construction was done in assembly line fashion on two tracks. The work was interrupted only two days by inclement weather and once due to shortage of materials for approximately one month from the time the work began to the time of trial. During the period when there was a shortage of materials for new construction the construction crews were assigned to repair work in order to keep the force intact. This was before Gileo was assigned to new car construction.

All the men working for SP were on one seniority list

and there was no bidding done for an individual job as such. If a man bid for a job in shop No. 9, he would be assigned to a particular job by the supervising staff.

Because of the importance of new car construction, a man assigned to this work was assigned on a continuous basis. However the number of men working on construction varied with the type of car being built. For example 425 men worked on the construction of automobile cars, but only 270 men worked on gons. There was approximately a 10% absenteeism rate and in order to keep the assembly line moving these vacancies were temporarily filled with men working in the repair department. But the men assigned to new construction were not moved temporarily to other jobs in case of short breakdowns and if assigned to other departments were done so on a permanent basis.

[fol. 339] Gileo first went to work for SP in the car shop at Sacramento in October 1941. He worked as a helper and apprentice learning the business and became a journeyman carman in April 1946. He also became qualified as a welder.

In February 1951 Gileo bid in for a job as welder in car shop No. 9. He worked on new automobile cars and after that worked on new gondola cars up until the time he was hurt on July 11, 1951. Gileo returned to work on the second day after the accident and again worked on gons until he bid in as an inspector in the car machine shop. Later as a result of the injury he began having recurrent headaches which forced him to leave work from time to time.

Gileo began working on the construction of new gons in April 1951 and from that time until he was hurt he was never assigned any repair work. From February to July he remembers a couple of times in which he did repair work. This work consisted of repairing a machine that had broken down and this machine was used in the construction of new cars.

It was stipulated by both parties that the issue of negligence be decided in favor of plaintiff; that if given judgment he recover $7000 in damages, that the court discharge the jury and rule as a matter of law whether or

not the Federal Employers Liability Act (FELA) applies in this fact situation. The court ruled that as a matter of law at the time plaintiff was injured defendant with respect to its activities connected with the injury was a common carrier engaged in interstate commerce and that the plaintiff's duties as employee included the furtherance of interstate commerce and directly and substantially affected such commerce. It therefore held that FELA is applicable as a matter of law.

The sole contention of appellant is that FELA is not applicable in this fact situation and therefore the trial court had no jurisdiction.

FELA was first passed in 1906 but was declared unconstitutional by the Supreme Court because it gave Congress the power to regulate subjects outside of its scope of authority. In 1908 the Act was made more restrictive [fol. 340] in its application to interstate commerce and therefore its constitutionality was sustained. In 1939 the Act was amended because under the case decisions it was necessary that the employee be engaged in interstate commerce at the very moment of injury to fall under the Act. This brought about harsh results in many cases. Therefore the amendment provided that employees "any part of whose *duties as such employee* shall be the furtherance of interstate . . . commerce; or shall in any way *directly* or *closely* and *substantially affect such commerce* . . . shall . . . be considered as entitled to the benefits of this chapter." (Emphasis ours.)

The only change made by the 1939 amendment was to give a new definition to the term "employee". In 10 A.L.R. 2d 1279 beginning at page 1281 a quotation from the Senate Judiciary Committee's deliberations on this amendment is made. This quotation recognizes that the difficult question of fact presented in many cases of whether or not at the moment of injury the injured person was engaged in interstate commerce resulted in unfair consequences because of needless expensive litigation and statute of limitations barriers if the plaintiff chose the wrong remedy. Consequently by this amendment Congress wished to abolish the requirement that the employee must be actually engaged in interstate traffic at the moment of injury. However the change from the "moment of injury"

test to the "duties as such employee" test still leaves a twilight zone in which the courts must make difficult fact decisions. Both parties agree that the only case squarely considering the question whether an employee of a railroad engaged exclusively in new construction is covered by the FELA is Moser v. Union Pacific Railroad Co., 147 P. 2d 336. In that case the Idaho Supreme Court held that a member of a construction crew engaged in the construction of new tracks and switches and a large icing dock was not covered by the FELA. This decision was by a closely divided court.

We need not decide whether this case was correctly decided on its facts, because in our case SP was not engaged in directly manufacturing new cars for its own use. It was manufacturing the cars under contract with [fol. 341] a separate corporation and after their manufacture title was transferred to another corporation which in turn leased the cars to SP or, in the case of the gons on which Gileo was working for a considerable period before his injury, to T & NO, a different railroad company. Under the facts of this case we are satisfied that SP was in no different position than a manufacturer, not engaged in railroading, which was manufacturing railroad cars to be delivered to any purchaser.

The more difficult question arises from the facts that Gileo was employed generally in the carshop and that he could at any time have been assigned to the repair work being done in the carshop, as evidenced by the fact that before he entered the carshop the crew engaged in new car construction was in fact transferred to repair work in the shop during the period when there was a shortage of material for new car construction. From these facts can it be said that a "part" of Gileo's "duties" "directly or closely and substantially" affected interstate commerce?

The question is pointed up by three decisions which seem most closely in point. In Wright v. New York Cent. R. Co., 33 N. Y. S. 2d 531, quoting from the opinion: "Claimant usually worked in intrastate commerce for five days a week and in interstate commerce for one day a week . . . when injured, he was engaged in intrastate commerce." The court held that since a part of the claimant's duties were interstate commerce he was covered by the FELA even

though on the day of his injury he was engaged exclusively in intrastate commerce. This case was affirmed by the Court of Appeals (43 N. E. 2d 97) and the U. S. Supreme Court denied certiorari (317 U. S. 668).

In Scarborough v. Pennsylvania R. Co., 35 Atl. 2d 603, a railroad signalman whose duties were generally in interstate commerce had for three weeks been engaged in installing new station lights when he was injured. The court held that even if this installation work did not fall under the definition of the FELA, i.e., if at the time of injury his work was exclusively intrastate, a part of his duties were in interstate commerce. The court said (p. 606): "Taking into consideration that Scarborough's general [fol. 342] duties were in interstate commerce, and that he was subject to call at all times for such service . . . he continued to be employed as a signalman. . . . He was subject to call to do temporary work, such as he was doing when injured, but the fact remains that he was always available to perform his general duties, which were in the furtherance of interstate commerce."

In Robinson v. Pennsylvania R. Co., 113 F. Supp. 863 a railroad carpenter was a member of a bridge repair crew which at times worked on railroad bridges and at times on highway bridges which crossed the railroad tracks. For almost 2 months before his injury he had been engaged exclusively in repairing a highway bridge. The court assumed that this work was exclusively intrastate, but none the less held that a part of the claimant's duties were in interstate commerce, saying (p. 865):

"Perhaps there may be situations where a railroad employee, whose work includes duties of both an interstate and intrastate nature, is engaged in work of an intrastate nature for so long a period that he will lose the coverage of the Act, but the present case, in my opinion, does not involve one of these situations."

These three cases have broadly construed the FELA to include within its scope employees who for a considerable period of time (5 days, 3 weeks, nearly 2 months) have been employed exclusively in intrastate commerce, where the general scope of duties performed by them over a longer period has included and would continue to include interstate employment.

The line must still be drawn somewhere. By adopting the "any part of whose duties" test the Congress has abolished the "moment of injury" test, but it has still left open the question under what circumstances may it be said that any part of an employee's duties closely affect interstate commerce.

In each of the three cases above discussed the employee was not only subject to assignment to interstate duties, but had previously been engaged in interstate duties in the very employment and presumably would soon be engaged in interstate duties again. In the case before us, under the practice adopted by SP, Gileo from the moment he entered the carshop on February 12, 1951, and was assigned [fol. 343] to new car construction until the time of his injury 6 months later was employed exclusively in new car construction. He could have been assigned to repair work but in practice he was not, and would not be, so long as the new car construction continued and the materials for new car construction were available. The bare possibility of future assignment to repair work standing alone, does not seem to us sufficient to make "any part of his duties" affect interstate commerce within the meaning of the FELA. The test must be a practical, not a purely theoretical one. No case has gone so far as to hold that an employee whose immediate work over a long period of time has been exclusively in intrastate commerce, and no part of whose work in the past in that particular employment has been in interstate commerce, is covered by the FELA because of the possibility only that he might have been assigned to interstate employment at any time. We are satisfied under the facts of this particular case that respondent was not covered by the FELA.

Judgment reversed.

Dooling, J.

We concur: Nourse, P. J., Kaufman, J.

[fols. 344-347] DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE FIRST APPELLATE DISTRICT, DIVISION TWO

San Francisco, California,
Wednesday, April 28, 1954.

15612

GILEO

vs.

SOUTHERN PACIFIC CO.

Judgment reversed. Dooling, J. We concur: Nourse, P.J., Kaufman, J.

I, Walter S. Chisholm, Clerk of the District Court of Appeal, State of California, in and for the First Appellate District, do hereby certify that the preceding and annexed is a true and correct copy of a minute order of January 12, 1954, a minute order of April 28, 1954, an opinion and judgment filed April 28, 1954 and a request for certified copy of record filed July 5, 1955, in case No. 1/Civil 15612, Charles M. Gileo vs. Southern Pacific Company, as shown by the records of my office.

Witness my hand and the seal of the Court, this 5th day of July, A. D. 1955. Walter S. Chisholm, Clerk. (Seal.)

[fols. 348-349] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SACRAMENTO

No. 88793

EPIMENIO MORENO, Plaintiff & Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, Defendant & Respondent.

Clerk's Transcript on Appeal

Appeal from the Judgment of the Superior Court of the State of California in and for the County of Sacramento.

Hon. J. O. Moncur, Judge

APPEARANCES

Nathaniel S. Colley, 421½ L Street, Sacramento, California, Counsel for Plaintiff & Appellant.

Devlin, Diepenbrock & Wulff, 1212 Calif. State Life Bldg., Sacramento 14, California, Counsel for Defendant & Repondent.

[fol. 350] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SACRAMENTO

COMPLAINT—Filed January 9, 1952

Comes now Plaintiff above-named, and for cause of action alleges:

First Cause of Action

I

That at all times mentioned herein Defendant, Southern Pacific Company, was, and is now, a corporation organized and existing under and by virtue of the laws of the State of Delaware, and duly authorized to do, and engaged in doing business in the State of California; that said Defendant is now, and at all times mentioned herein has been,

engaged in the business of operating a series of railroad trains between several of the states of the United States for the transportation of passengers and freight for hire as a common carrier; that as a part of its said business Defendant maintains and operates at the City of Roseville, County of Placer, State of California, certain railroad yards and repair facilities for its trains, and on or about the 19th day of December, 1951, employed Plaintiff as a laborer to help keep Defendant's said tracks in good repair; that at all times mentioned herein Plaintiff was acting within the course and scope of his said employment.

II

That on or about the 19th day of December, 1951, near Roseville, California, the Defendant, its agents, servants and employees, so negligently operated a certain crane of said Defendant that a large rail of Defendant then and [fol. 351] there being lowered by said crane was caused to fall upon the right foot of Plaintiff, thereby breaking, crushing and bruising the same.

III

That because of the injuries suffered as aforesaid, Plaintiff underwent severe pain, fright and shock to his nervous system, and suffered a permanent general weakening in his health, strength, activity and earning power, all to his damage in the sum of $40,000.00.

IV

That by reason of his injuries suffered as aforesaid Plaintiff was for a long period of time confined to a hospital bed, and required the services of physicians, surgeons and nurses, at a cost to Plaintiff in a sum the exact amount of which he does not know at this time. Plaintiff is informed and believes, and therefore alleges that he shall require the services of such physicians, surgeons and nurses for a long time to come, and shall ask leave to amend this complaint to show the exact amount of the cost of such items when the same have been ascertained.

Second Cause of Action

I

Plaintiff refers to paragraphs I, III & IV of his First Cause of Action, and by such reference makes them a part hereof.

II

That on or about the 19th day of December, 1951, the Defendant, its agents, servants and employees, so negligently maintained a certain crane of Defendant that the [fol. 352] same was unsafe and defective, and a large rail of Defendant then and there being lowered by said crane was caused to abruptly fall upon the right foot of Plaintiff, thereby bruising, breaking and crushing the same.

Third Cause of Action

I

That on or about the 19th day of December, 1951, near Roseville, California, the Defendant negligently failed to provide Plaintiff with a safe place to work, and required Plaintiff to work too close to dangerous and defective machinery, and required Plaintiff to handle heavy machin tools and rails while standing on a ground surface wh as Defendant well knew, or in the exercise of ordinary care should have known, was slippery and dangerous.

Wherefore, Plaintiff prays judgment against Defendant for the sum of $40,000.00, plus costs of suit herein and such other and further relief as to the Court seems just and proper.

(S.) Nathaniel S. Colley, Attorney for Plaintiff.

[fol. 353] *Duly sworn to by Nathaniel S. Colley jurat omitted in printing.*

[File endorsement omitted.]

[fol. 354] IN SUPERIOR COURT OF SACRAMENTO COUNTY

ANSWER—Filed February 29, 1952

Now comes the above named defendant and answering the first alleged cause of action set forth in the complaint of plaintiff on file herein, admits, denies and alleges as follows, to-wit:

I

Answering Paragraph I of said first alleged cause of action set forth in said complaint, defendant denies that at the alleged or any time the defendant employed plaintiff as a laborer, or otherwise, to help or otherwise keep defendant's alleged or any tracks in repair and in this regard avers that at all times mentioned in said complaint plaintiff was employed by the defendant as a laborer to solely assist in the construction of a new retarder yard at or near Roseville, California.

II

Answering Paragraphs II, III and IV of said first alleged cause of action set forth in said complaint, defendant denies each and every, all and singular, the allegations set forth in said paragraphs, and each of them, and in further answer to said paragraphs this defendant denies that the plaintiff was damaged by reason of the alleged or any negligence of said defendant in the sum of Forty Thousand Dollars ($40,000.00) or any other sum, or at all.

In answer to the second alleged cause of action set forth in the complaint of plaintiff, defendant admits, [fol. 355] denies and alleges as follows, to wit:

I

Answering Paragraph I of said second alleged cause of action set forth in said complaint, defendant adopts Paragraphs I and II of its answer to the first alleged cause of action set forth in said complaint and by reference thereto makes said Paragraphs, and each of them, a part of this answer to said second alleged cause of action to the same extent and with the same force and effect as though said paragraphs, and each of them, were fully set forth herein.

II

Answering Paragraph II of said second alleged cause of action set forth in said complaint, defendant denies each and every, all and singular, the allegations therein set forth.

In answer to the third alleged cause of action set forth in the complaint of plaintiff, defendant admits, denies and alleges as follows, to-wit:

I

Answering Paragraph I of said third alleged cause of action set forth in said complaint, defendant denies each and every, all and singular, the allegations therein set forth.

As and for a second, further and separate defense to all of the alleged causes of action set forth in said complaint of said plaintiff, and without prejudice to the defense hereinabove set forth, defendant avers:

That the court has no jurisdiction over the subject matter [fol. 356] of the above entitled action, nor any of the causes of action set forth in said complaint of plaintiff.

As and for a third, further and separate defense to all of the alleged causes of action set forth in said complaint of said plaintiff, and without prejudice to the defense hereinabove set forth, defendant avers:

That the plaintiff himself was negligent and careless in all of the matters and things in said complaint set forth and that said negligence and carelessness of plaintiff proximately contributed to the happening of the accident in the complaint referred to and the injuries, if any, complained of by plaintiff.

As and for a fourth, further and separate defense to all of the alleged causes of action set forth in said complaint of said plaintiff, and without prejudice to the defense hereinabove set forth, defendant avers:

That the plaintiff himself was negligent and careless in all of the matters and things in said complaint set forth and that said negligence and carelessness of plaintiff was the sole, proximate cause of his injuries, if any.

Wherefore, defendant prays that plaintiff take nothing by his said complaint and that the same be dismissed and defendant recover its costs of suit herein incurred.

Dated: February 27, 1952.

(S.) Devlin, Diepenbrock & Wuiff, Attorneys for Defendant.

[fol. 357] *Duly sworn to by Roy G. Hillebrand jurat omitted in printing.*

Affidavit of Service by Mail (omitted in printing)

[fol. 358] [File endorsement omitted.]

[fol. 359] In Superior Court of Sacramento County

Judgment on Verdict—July 17, 1952

We, the Jury in the above entitled cause, find for the Plaintiff, Epimenio Moreno, and against the Defendant Southern Pacific Company, a Corporation, and assess damages in the sum of $5,000.00.

A. C. Jerabek, Foreman.

No. 88793
Judg't Entered JUL 17 1952
In Judgment Book 117, Page 459
at 3:50 o'clock P. M.
Judgment Roll Filed JUL 17 1952
C. C. LaRue, CLERK
By J. M. Smith, Deputy
ENDORSED-FILED
JUL 17 1952
C. C. LaRUE, Clerk
By G. L. Swetzer, Deputy

[fol. 360] IN SUPERIOR COURT OF SACRAMENTO COUNTY

OPINION—July 21, 1952

The above entitled action was tried with a jury. At the conclusion of plaintiff's evidence a motion for a non-suit was made by defendant, which motion was denied by the Court. At the conclusion of the evidence in the case, and before argument, defendant moved for a directed verdict, which motion also was denied by the Court. After arguments by respective counsel and instructions by the Court, the jury returned a verdict in favor of plaintiff in the sum of $5,000, and thereupon defendant moved for judgment for defendant notwithstanding the verdict of the jury.

It is the contention of defendant that the evidence in this case failed to show any negligence on the part of defendant, and particularly that there was no evidence that if any negligence was shown, it was not a proximate cause of the accident.

It appears that plaintiff was employed by defendant near Roseville, California, in setting rails for a track in the switch yard of defendant. These rails were handled by a crane acting under power, and plaintiff, with another, was guiding the rails into place on the ties. As a rail was being lowered and plaintiff was holding the end of the rail, it appears that the rail diverged to some extent from a parallel line with the track to which it was to be attached, and as plaintiff was holding the rail his foot slipped so that the rail came in contact with his foot and occasioned the injuries set forth in the complaint. It appears that plain-
[fol. 361] tiff's foot slipped on a metal plate which apparently was on the ground near his foot. There is no evidence that the defendant knew of the presence of the metal plate at that particular place or that plaintiff saw the plate or knew that it was there. It appears from the evidence that the ground was wet but it does not show whether the plate was covered or was visible. The evidence does not show that defendant was guilty of any negligence whatsoever in the operation of the crane and if any negligence could be imputed to defendant it must be by reason of the presence of the metal plate on the ground upon which the plaintiff slipped, unless it can be said that the presence of

this metal plate at that particular place would justify a finding that the presence of said metal plate rendered the area where plaintiff was employed an unsafe place for plaintiff to work.

It is my opinion that the evidence will not support a finding of negligence on the part of the defendant based upon the allegation that the place where plaintiff was working was an unsafe place.

I conclude that this unfortunate accident was unavoidable and not due to any negligence on the part of either party to the action. Therefore the motion for a judgment for defendant notwithstanding verdict of the jury will be granted and it will be so ordered.

Dated: July 21, 1952.

(S.) J. O. Moneur, Judge.

[fol. 362] [File endorsement omitted.]

[fol. 363] In Superior Court of Sacramento County

Judgment Notwithstanding Verdict—July 22, 1952

This cause having come on for trial on June 18, 1952, before the above entitled Court, without a jury, on the special issue raised by the answer of the above named defendant that the Court has no jurisdiction over the subject matter of said action, and the plaintiff appearing personally and by his counsel, Nathaniel S. Colley, Esq., and the defendant appearing and by its counsel Arthur B. Dunne, Esq., and Messrs. Devlin, Diepenbrock & Wulff, and evidence both oral and documentary having been adduced, and said issue having been submitted for decision, and the Court having decided said issue in favor of the plaintiff and having ordered plaintiff's counsel to prepare and submit findings of fact and conclusions of law (which have not yet been submitted), and

This cause having come on for trial on its merits before the above entitled court and jury on July 15, 1952, plaintiff appearing personally and by his counsel Nathaniel S. Colley, Esq., and defendant appearing and by its counsel Devlin,

Diepenbrock & Wulff, and oral and documentary evidence having been adduced and defendant having timely made a motion for a directed verdict, which motion was denied but should have been granted, and the jury having rendered its verdict in favor of plaintiff and against defendant in the sum of Five Thousand Dollars ($5,000.00), and prior to the entry of judgment on said verdict, said defendant having moved for a judgment notwithstanding said verdict, and it [fol. 364] appearing to the satisfaction of the court that said motion should be granted, and good cause appearing therefor,

It is now ordered, adjudged and decreed as follows, to-wit:

1. That the verdict rendered by the jury in the above entitled action on July 18, 1952, in favor of plaintiff and against defendant in the sum of Five Thousand Dollars ($5,000.00) be, and the same is hereby set aside.

2. That the plaintiff take nothing by reason of the above entitled action and said action be, and the same is hereby dismissed, and defendant Southern Pacific Company, a corporation, do have and recover from said plaintiff its costs of suit herein incurred in the sum of ($242.58). $113.65

Dated: July 22, 1952.

J. O. Moncur, Judge of the Superior Court.

[File endorsements omitted.]

[fols. 365-366] In Superior Court of Sacramento County

Notice of Appeal—Filed August 26, 1952

To the Clerk of the Above Entitled Court:

You will please take notice that Epimenio Moreno, plaintiff in the above-entitled action, hereby appeals to the District Court of Appeal of the State of California, Third Appellate District, from the whole of the judgment in said action rendered in favor of defendant and against the plaintiff and entered on the 22nd day of July, 1952, in Book of Judgments 117 at Page 501, of the records of the Superior

Court of the State of California, in and for the County of Sacramento.

Dated this 25th day of August, 1952.

(S.) Nathaniel S. Colley, Attorney for Plaintiff.

Affidavit of Service by Mail (Omitted in Printing)

[fol. 367] In Superior Court of Sacramento County

Notice to Prepare Clerk's Transcript—Filed August 26, 1952

To the Clerk of the Above Entitled Court:

Please take notice that Epimenio Moreno, plaintiff in the above entitled action, having appealed from the whole of the judgment rendered in said action as particularly designated in the Notice of Appeal on file herein, does hereby request that a clerk's transcript be made up and prepared in accordance with Rule 5 of Rules on Appeal and does hereby designate the following papers or records on file or lodged with the Clerk, which said plaintiff desires incorporated in the record on appeal:

1. Complaint of the plaintiff.
2. Answer of the defendant.
3. All exhibits adduced at the trial of said action (to be transmitted to the Clerk of the District Court of Appeal Third Appellate District, in their original form);
4. Verdict of the jury in favor of plaintiff.
5. Opinion of the Court with order granting motion for Judgment notwithstanding the Verdict which Order was made on the 21st day of July, 1952.
5. Judgment in favor of the defendant and against plaintiff entered on the 22nd day of July, 1952.
6. Notice of Appeal.

7. Notice to Prepare Clerk's Transcript.
8. Notice to Prepare Reporter's Transcript.

[fol. 368] Dated this 25th day of August, 1952.

(S.) Nathaniel S. Colley, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 369] In Superior Court of Sacramento County

Notice to Prepare Reporter's Transcript—Filed August 26, 1952

To the Clerk of the Above Entitled Court:

Please take notice that Epimenio Moreno, plaintiff in the above entitled action, having appealed from the Judgment rendered in the above entitled action, as particularly designated in his Notice of Appeal on file herein, does hereby request the preparation of a reporter's transcript of the oral proceedings in said action, of all of the testimony and evidence offered and received in said action, on the trial thereof of all of the rulings and statements of the Court, of all of the written or oral instructions, whether given or refused, and, also, of all objections and exceptions of counsel, all to be prepared pursuant to Rule 4 of the Rules on Appeal.

Dated this 25th day of August, 1952.

(S.) Nathaniel S. Colley, Attorney for Plaintiff.

[File endorsement omitted.]

[fols. 370-374] Clerk's Certificate to foregoing transcript omitted in printing. (Seal.)

[fol. 375] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SACRAMENTO

Before Hon. J. O. Moncur, Judge Presiding

No. 88793

EPIMENIO MORENO, Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, Defendant

Reporter's Transcript

Wednesday, June 18, 1952

The above entitled cause came on regularly this day before Hon. J. O. Moncur, Judge of the Superior Court, Department 4. The Plaintiff was represented by Nathaniel S. Colley, Esq. The defendant was represented by Horace B. Wulff, Esq., and Arthur Dunne, Esq. The following proceedings were then had and the following testimony was taken, to-wit:

The Clerk: Moreno vs. Southern Pacific.

Mr. Colley: Ready for the Plaintiff.

Mr. Wulff: Ready for the defendant.

The Court: You may proceed.

Mr. Wulff: Your Honor, at this time I would like to associate the firm of Dunne, Dunne & Phelps with my firm [fol. 376] as attorney for defendants.

The Court: The order of association may be made.

Mr. Colley: Does the Court want a preliminary statement of our position and what we intend to show in this special proceeding?

The Court: I don't believe that is necessary. I believe I understand it.

Mr. Colley: All right, your Honor. Mr. Turner.

(William F. Turner was then called and sworn as a witness on behalf of the Plaintiff.)

Testimony of WILLIAM F. TURNER, a witness produced on behalf of Plaintiff herein, Sworn:

Direct examination.

By Nathaniel S. Colley, Esq., counsel on behalf of Plaintiff:

Q. Would you state your name, please?
A. William F. Turner.
Q. Where do you live, Mr. Turner?
A. Sacramento.
Q. What is your occupation?
A. Construction Division Engineer for the Southern Pacific.
Q. Of which Division are you Superintendent?
A. I am not Superintendent of any Division. I work out of the Engineer's office, San Francisco.
Q. You work out of the Engineer's Office in San Francisco?
A. Chief Engineer's office.
Q. Then your Southern Pacific Title is what?
[fol. 377] A. Construction Division Engineer.
Q. In your capacity as Construction Division Engineer, did you have occasion to superintend the construction of a retarder yard in Roseville, California?
A. Yes, sir.
Q. Would you tell us when that project was commenced, the actual construction, the physical construction?
A. Commenced in April, 1951.
Q. Did you have knowledge as to the purpose of the project?
A. Well, the purpose is to speed up the classification of cars and certain economies to be effected.
Q. In other words, the purpose of the project, then, stated another way, is to better facilitate the movements of the Southern Pacific Company's trains?
A. Freight trains, yes.
Q. Freight trains?
A. Freight trains.
Q. These freight trains whose movements this project is intended to facilitate come from over all lines?

A. Yes, they come from all over.

Q. When I refer to all over lines, I have reference to out of the State, for instance.

A. Yes, they come from the east.

Q. When you say "east" just where do you have in mind?

A. Well, they come from anywhere in the east, Ogden, Chicago, New York.

[fol. 378] Q. You mean Ogden Utah, Chicago, Illinois, and New York, New York?

A. Yes, and many other places.

Q. Before we go into the construction of the project itself, would you tell us in what way this new retarder yard is supposed to facilitate the movements of these trains?

A. Well, the switching is done by gravity.

Q. The switching in the new retarder yard is done by gravity?

A. Yes, sir.

Q. How was it done prior to the new retarder yard?

A. Well, there was no retarder yard there. What switching was done, was done by switch engines.

Q. And by using the gravity method in the retarder yard, do you save time?

A. It saves time and also effects economies.

Q. Effects certain economies for the Company?

A. Yes.

Q. So this project then, was an improvement in the switching operations over an existing method of switching, is that right?

A. Well, it was—of course, this was a brand new project, and it facilitates switching.

Q. I realize that you are constructing certain new spur tracks and certain new switching tracks, we understand that, but after the project was constructed, this new retarder yard, you no longer followed the manual switching operations that you followed prior to that time, is that correct?

A. That is correct, yes.

[fol. 379] Q. So that this switching operation in the retarder yard takes the place of the previously existing switching method?

A. I think so, yes.

Q. Where is this yard constructed in relation to the main line running from, say, Sacramento to Reno, the main line of the Southern Pacific Company?

A. The main line that existed prior to this construction was removed and a new main line was constructed on the north side of the yard.

Q. The main line which existed prior to this project was removed?

A. Yes.

Q. And a new main line was put in?

A. Yes.

Q. When was the job of removing the old main line commenced?

A. It was commenced just after the first of October in 1951.

Q. And the construction on the new retarder yard had begun in April?

A. Yes.

Q. Where was the new main line put in relation to where the old main line was? Was a new right of way selected?

A. It was placed in an entirely new location, about a quarter of a mile north of the yard.

Q. About a quarter of a mile north of the yard?

A. Yes. That would be about the same distance north of the old main line.

Q. What was the purpose of moving the old main line to a new place?

A. Well, because the new main line was entirely con- [fol. 380] structed to take passenger trains around the yard. All freight trains coming into the yard stop there and are taken through the classification yard, and the original main line movement of freight trains within the yard limits—for within the limits of the yard.

Q. Would you say, then, that the altering of the main line and the construction of this new retarder yard were all a part of one integrated operation?

A. They were all part of the project, yes.

Q. All a part of one integrated project?

A. Yes.

Q. When you changed the old main line to a new place,

where did the trains run while you were changing the position of the main line?

A. Well, they ran over the old main line until the new main line was placed in operation.

Q. In other words, when the new main line was completed, then you effected the switch-over?

A. Yes.

Q. When was the new main line completed?

A. It was completed, finally completed in November of 1951.

Q. November of 1951?

A. Yes.

Q. And did it go into operation immediately?

A. It had been in operation prior to that at a restricted speed.

Q. And it went into operation full blast, so to speak, on the 15th of November, 1951?

A. Yes.

[fol. 381] Q. So then, by the 19th of December, 1951, the main line was no longer at the old place so far as train operations are concerned?

A. It was gone.

Q. It was gone?

A. Yes.

Q. And the trains from the east and the points you have mentioned were going over the main line at the new place where it had been constructed?

A. Well, that was only passenger trains. All freight trains were stopping in the yard.

Q. Now, I want to understand this: When did you put the new retarder yard in operation?

A. The first unit went in operation on the first of April, 1952.

Q. First of April 1952?

A. Yes.

Q. But the new main line went into operation in November 1951?

A. Yes.

Q. Where is the new main line in relation to the new retarder yard?

A. It is about a quarter of a mile north of the new retarder yard.

Q. But isn't the new retarder yard connected by rail to the new main line?

A. Well, it is connected by rail at each end.

Q. At each end to the new main line?

A. Well, no, it is connected at each end to the old main line, and the old main line then swings around north of the yard as the new main line.

[fol. 382] Q. Do any freight trains use this section of new main line that you put in?

A. No freight trains, no.

Q. This new main line you referred to is a passenger operation?

A. The passenger main line, yes.

Q. And the freight trains still use the old main line?

A. No, the old main line is gone. The freight trains come into the yard and they stop. From there they are broken up.

Mr. Dunne: You say the old main line was abandoned?

A. Yes, the old main line is gone. The freight trains enter into the yard and there they stop until they are entirely remade into new freight trains, and the cars classified when they leave. There is no main line through the yard.

Mr. Colley:

Q. There is just a spur track leading into the yard?

A. There is a connection at each end of the yard for freight trains to enter the yard.

Q. And no freight trains entered this yard until April, 1952?

A. Yes, they entered the yard before that.

Q. About when was the first time any freight trains started entering the retarder yard?

A. The first freight trains started entering the part of the project, the new project, in August, 1951.

Mr. Dunne: Were those——

Mr. Colley: Just a minute, now.

Mr. Dunne: I am sorry.

Mr. Colley: This is direct——

[fol. 383] Mr. Dunne: I am sorry.

The Court: Wait.

Mr. Danne: I am sorry, I didn't want to interrupt counsel. I was going to try to clear something, but if counsel wants to go ahead in his own way, I would like him to do it and not interrupt.

The Court: Proceed.

Mr. Colley:

Q. In August of 1951, the trains that you referred to had commenced to come into the yard; were they trains from eastern points you have referred to?

A. No, the trains from the eastern points enter what had been the old yard. In August, 1951, the receiving yard was constructed. And the trains coming from the west entered that receiving yard.

Q. When you say coming from the west, where do you mean?

A. I mean from points in California and on the Pacific Coast; anywhere west of Roseville.

Q. Would that include points in Oregon, for instance?

A. No, the Oregon trains came into the old yard at that time.

Q. When was the first time any of these freight trains, originating, for instance, in Oregon or Reno, went into any part of this new project, new Retarder yard project?

A. They started coming into the new project about the 2nd of June, the week of the second of June, this year.

Q. Prior to that time none of the freight trains from Reno or any other point entered any part of the new retarder yard?

[fol. 384] A. No, they had come into what was the old yard, which ultimately—which is the receiving yard. The trains from the north came into the old yard, which was at the east end of the old Roseville yard. Trains from the Ogden direction came into what is the receiving yard now. And the trains from the west came into what is now the receiving yard.

Q. But the place which is now the receiving yard is a part of this new retarder yard project, isn't it?

A. It is a part of the project, yes.

Q. And when you say those trains from Ogden and other

places came into what is now the receiving yard, you mean they commenced to come in there in August of 1951?

A. Yes.

Mr. Colley: You may cross examine.

(The witness was then taken for cross examination by Mr. Dunne.)

Cross examination.

By Arthur Dunne, Esq., of counsel on behalf of Defendant:

Q. Mr. Turner, before this project started—have you seen this map?

Mr. Colley: Yes, I have seen that. It is perfectly all right to use that.

Mr. Dunne:

Q. You are familiar with this map, Mr. Turner?

A. Yes, sir.

Q. Generally, what does this map show?

A. It shows the project which consists of the receiving [fol. 385] yard, classification yard, and the departure yard.

Mr. Dunne: May we have this marked in evidence as our first exhibit, your Honor?

The Court: Very well, Defendant's Exhibit A in evidence.

(The map last above referred to was by the Clerk then marked Defendant's Exhibit A in evidence.)

Mr. Dunne: It is on such small scale, your Honor, I think it would be better to have it in your hand if you want to look at it. May the witness stand up so that we can roll this out, your Honor?

The Court: Yes, certainly.

Mr. Dunne: And when you stand up here, Mr. Turner, will you keep your voice up so that the reporter can hear you.

Q. Will you point out to me the west end of the retarder yard?

The Court: The top of the map points north?

A. This is the West. (Indicating).

Mr. Dunne: I will put a "W" over here, if I may.

A. This is north. This is west.

Q. Will you show me about the western limits of the classification yard?

A. The classification yard west limit is right here (indicating).

Q. Where is the hump?

A. Right here (indicating).

Q. Was the hump part of the new contsruction of the retarder yard?

A. Yes.

Q. So the new construction for the retarder yard would [fol. 386] begin about here (indicating)?

A. The classification yard?

Q. Yes.

A. Yes.

Q. I will put a line across there, if I may, and I will mark that A-1. Now, over on this side I notice that these tracks fan out and then come together again. Where is the easterly limit of the new construction?

A. Right here (indicating).

Q. I will draw a line across there and mark that A-2. Now, Mr. Turner, prior to the undertaking of any new construction, to the west of the limit you have marked at A-1, and the retarder yard, was there a yard?

A. There was a yard here, yes.

Q. What was that yard known as?

A. The north of the main line, it was known as the Antelope Yard, and south of the main line it was known as the High Line.

Q. Antelope Yard and High Line. Now, before this work was begun here, were there any yards to the east of the east limit of the new retarder yard you have marked A-2?

A. There was the west yard here (indicating).

Q. West yard.

A. And the east yard here (indicating).

Q. Those are Roseville proper, are they?

A. Yes.

Q. Now, before the starting of this new retarder yard, what was there between the west and east yards at Roseville and the Antelope and High Line yards down towards [fol. 387] Antelope and in the area where you put in the new retarder yard?

A. There was nothing except the two main lines and the two drill tracks and this yard here.

Q. Physically, the purpose of putting in the new retarder yard between the limits A-1 and A-2, so far as any track is concerned, what was the first work that was done?

A. Grading the site.

Q. And in grading the site, what became of these old tracks that were in there?

A. They were taken up.

Q. Taken up and abandoned, I take it?

A. Taken up and abandoned, yes.

Q. Since that was the main line, in anticipation of that, you had built a new main line for the passenger trains?

A. Yes, sir.

Q. Where was that located?

A. That is over here (indicating).

Q. I will mark that "New main". And is this a correct assumption, that that new main was completed and in shape to carry trains before you tore up the old main line?

A. Oh, yes, this was placed in operation before this main line was taken up.

Q. Do you recall when it was placed in operation?

A. It was placed in operation October 1, 1951.

Q. And when did the work of tearing up for abandonment the old tracks that had been here, when did that begin? [fol. 388] A. Immediately after October 1st, as soon as this line was placed in operation.

Q. So that whatever the whole project might have been, the actual physical work in the new retarder yard itself began on October 1, 1951?

A. It began in the classification yard.

Q. Classification yard. You are making a distinction—did you make a distinction between the classification yard and the retarder yard?

A. Well, the retarder yard covers the entire project, the receiving yard, classification yard, and the departure yard.

This classification yard is merely this one unit of the entire retarder yard project.

Q. So what you were putting in between limits A-1 and A-2 was the new classification yard?

A. Yes.

Q. That was entirely new construction?

A. That was all new construction.

Q. Then, before that new construction could begin you had to get the main line in operation?

A. Yes, sir.

Q. And the first physical work on that new construction of the classification yard began on October 1, 1951?

A. That was the taking up of the track.

Q. That was taken up for abandonment the old main line?

A. Yes. The grading had started prior to that.

Q. I notice on this map what appears to be identified [fol. 389] here as a subdivision.

A. Yes.

Q. For the purpose of putting in this new classification yard, was additional property acquired by the Southern Pacific Company?

A. Yes, they had to buy additional property.

Q. Do you know about how much?

A. No, I don't. It was handled by the industrial department. I would say about 80 acres.

Q. So far as the new classification yard was concerned, when was the first revenue train in any part of that yard?

A. That was on April 1, 1952.

Q. I suppose you brought materials in there in cars before that?

A. Yes, we had to bring materials in, yes.

Q. But was any railroad in there except to bring materials in there to build the project?

A. No, not until April 1, 1952.

Q. These were S. P. materials for the purpose of the construction gang?

A. Yes.

Q. Now, Mr. Turner, was this method—first I wish you would describe for his Honor generally, the character of operation of the new classification yard after it was constructed and in operation. What was the design and purpose of this new yard you were building?

A. The trains come into the receiving yard with the cars of various destinations mixed up in it, and from there they [fol. 390] are shoved on to a hump, which is a hill, and at the top of the hump they are cut off and go down by gravity into the various tracks, each track being designated for a particular destination. In other words, all the Portland cars would go in one track and all Ogden cars in another, and so on. And the function of the retarder is to control the speed of the cars going down the hump, so that they do not run out the other end of the yard or cause damage by striking other cars that may be on that track.

Q. What is a retarder? How does it work?

A. A retarder is a metal strip which squeezes the wheels on each side, worked by compressed air.

Q. And where, physically, in the new classification yard, were those retarders located; which end?

A. They were located at the west end.

Q. How many tracks feed into the new classification yard?

A. There are 49 tracks into the classification yard.

Q. And how many tracks lead over the hump?

A. Two tracks.

Q. And these retarders are located just east of the hump, is that correct?

A. They are located just east of the crest of the hump.

Q. That method of controlling the speed of the cars rolling on the classification tracks, was that something entirely new at Roseville?

A. It was entirely new for Roseville.

[fol. 391] Q. New in construction and new in manner of handling cars?

A. Yes.

Q. Now, the other end of the yard, it is on a down grade, there must be some method of bringing cars to a stop; how is that done?

A. There are men down there that place skates on the rails, and the wheel of the car runs up on the base of the skate, runs along until it finally comes to a stop.

Q. With the old method of manual switching of cars, how were cars brought to a stop?

A. They were stopped by applying brakes or running into other cars.

Q. By a man riding on the cars?

A. Men rode on the cars and applied the brakes if they had to stop them. That is the only way there was to stop them.

Q. In using this method of operation, does the man ride the cars going down over the hump?

A. No.

Q. So in that respect, in theory and method of operation, this was something entirely new for Roseville?

A. Yes.

Q. So that his Honor may have some idea of how this project was put into operation, and the construction of it, what was the general character of the land there before you started this work?

A. Well, the general character was a hill—referring to the classification yard, there was a hill on the south side [fol. 392] and flat land on the north side, and this hill was taken down and the material used in the flat portion to bring the yard to proper grade.

Q. Do you know about how many cubic yards of earth was moved in that operation?

A. About 300,000 yards in that operation.

Q. Who did that operation?

A. Morrison-Knudsen Contracting Company did the grading.

Q. An outside contract?

A. Yes; an outside contract.

Q. When was that grading completed?

A. That grading was completed about the first week of October, 1951?

Q. Did that cover this whole area that is now covered by the new classification yard?

A. Yes, sir.

Q. How did the grade, when that grading completed, compare with the grade of the old main line?

A. It is three or four feet higher than the old main line.

Q. It covered the grade of the old main line?

A. Yes.

Q. Generally what was the characteristic of that grade, a hump to the west and slope eastward?

A. There was a hump to the west of the classification yard, just west, then it slopes on eastward to the east end of the yard.

Q. This is a photograph, Mr. Turner, which has typed [fol. 393] on the back of it a notation "View looking east showing classification yard taken from point on Tower C. Taken October 16, 1951." I will ask you if you had that picture taken?

A. Yes, sir.

Q. And is that a proper and accurate photographic representation of the area eventually covered by the classification yard on that date and after the grading had been done?

A. Yes, sir.

Mr. Dunne: We will offer this in evidence, if your Honor please.

(The photograph last above referred to was by the Clerk then marked Defendant's Exhibit B in evidence.)

Mr. Dunne:

Q. What you had on that date, Mr. Turner, was just bare ground?

A. Just the grade.

Q. And by that time the old tracks were out, abandoned, and where they had been was covered up with three or four feet of earth?

A. Yes, sir.

Q. And no tracks in there at all?

A. No, sir.

Q. Now, how many tracks, when this classification yard was to be completed, how many tracks would be in there?

A. Forty-nine.

Q. About how many miles of track would that be?

A. About thirty miles of track all together.

Q. How many switches?

A. Ninety-eight switches.

[fol. 394] The Court: How many?

A. Ninety-eight.

Mr. Dunne:

Q. That was all new?

A. That was all new, yes.

Q. How many retarders?

A. Twelve retarders.

Q. You told us the men don't ride the cars. I assume that the handling of the operation of those cars is from some central point or points, is that right?

A. Yes, sir.

Q. What are those points called?

A. Tower A, Tower B, Tower C, Tower D; three towers.

Q. And that was entirely new construction?

A. That was entirely new, yes, sir.

Q. There had been no such towers as that at Roseville before?

A. No.

Q. In addition to that, was there a place for a man at the hump in charge of the operation?

A. There is a hump master in the tower. He is the supervisor. He has charge of it. And there are two hump conductors at the crest of the hump, and they supervise the cutting of the cars, that is, whether there shall be one car go down or two or three or whatever the number is.

Q. What is the mechanical means by which the retarders or switches were actually operated, physically operated?

A. Compressed air.

[fol. 395] Q. Where did that compressed air come from?

A. Comes from three compressors.

Q. Where are they located?

A. They are located just a little south of the retarders, southeast of the retarders.

Q. In some kind of a building, I presume?

A. Yes.

Q. Now, that is not in the classification yard?

A. Yes, it is.

Q. And that was entirely new?

A. That was new, yes.

Q. Entirely new in material and also entirely new in purpose, isn't that right?

A. Yes, sir.

Q. Was there a pit constructed to the west of the classification yard?

A. A what?

Q. A pit or pits?

A. Yes, there was an inspection pit.

Q. *Will you tell his Honor what those inspection pits* were and what their purpose was?

A. They are beneath the tracks that go over the hump west of the crest of the hump, and in it is a man who looks at the side of the car, a man who looks at the bottom of the car, a man who looks at the other side, and a man in the tower who looks at the roof, and they inspect the cars as they are pushed up the grade to the crest of the hump.

Q. Were those pits new construction?

A. They were all new, yes.

[fol. 396] Q. And the purpose of constructing them was so that the cars could be constructed before they went into the classification yard?

A. Yes, sir.

Q. When you didn't have this type of yard, with the old method of manual switching in other yards, how were cars inspected?

A. Men had to walk around the train and look at each individual car.

Q. So this new inspection pit was also new in construction and new in theory and method of operation?

A. Yes, sir.

Q. Was any place constructed for keeping track of these cars? Did you have an office or a tag room?

A. There is a tag room just east of the inspection pit where the cars are tagged if they find a defect. They are tagged on the car.

Q. Was the construction of that room entirely new construction?

A. That was new, yes.

Q. Was there any method provided for lighting at night?

A. Yes, sir.

Q. And what was that?

A. That consisted of five 100-foot steel towers with flood lights on top of them.

Q. Was that new construction?

A. That was all new, yes.

Q. Was any signal system constructed?

A. Yes, sir.

Q. What was that?

A. Well, *there are eight* signals on the hump which [fol. 397] govern the humping of the trains. In other words, if they are *red*, the humping must stop, and when they are green it is all right to go ahead and shove cars over the hump.

Q. Was that new construction?

A. Yes, sir.

Q. Was there any communication system provided in the yard?

A. Yes, sir.

Q. What was that?

A. Well, there are—all through the yard there are what they call low level speakers which permits a man to talk to the hump master or the yardmaster, and there is also radio communication between the hump master and the switch engine. And there are high level amplifiers, if you want to have somebody come and talk, you call him through these amplifiers anywhere in the yard.

Q. Was that new construction?

A. Yes, that was all new.

Q. So that His Honor may have some idea of the size of this project, about how many acres, if you can tell us, did the new classification yard cover?

A. Approximately 60 acres in the classification yard.

Q. You told us you had to pick up or build a new main line, then you abandoned and covered over the old main line. In building this yard, was it necessary for you to move or reconstruct or deal with any other lines of communication, not those of the Southern Pacific Company?

A. Yes, we had to move a great many things.

[fol. 398] Q. Will you tell us a few of the other things you had to move?

A. We had to move a Pacific Gas & Electric Tower Line, a tower line belonging to the Sacramento Municipal Utility District, Pacific Gas & Electric gas line, two county roads, and a small portion of the Telephone Company's line, and a large part of the Western Union Telegraph line.

Q. Are you able to tell us about what the cost of the new classification yard is or will be when it is finally determined?

A. About a little over a million dollars.

Q. Does that include the grading?

A. Yes, that includes the grading.

Q. Now, Mr. Turner, if you can give us the sequence on this so that we can follow it, and I hope I may be permitted to ask one or two leading questions to get you up to the point. Of course, you have already testified to this, the first thing done was to get ready a new main line so that you could tear out and abandon the old one?

A. Yes.

Q. The next step was the tearing out of the old main lines?

A. Yes.

Q. Then the grading?

A. No. The grading started in June, 1951. There was a large area which could be graded, where there wasn't anything at all, and the grading ended where the new main lines were. So that the last of the grading was over where the main lines had been, but the area had largely been graded before they were taken up.

[fol. 399] Q. Tell us about when that grading was finished?

A. It was finished shortly after the first of October, 1951, just as soon as we had the old main line out of the way.

Q. Was that the only work that was done by outside forces?

A. No, there was some other work done by outside forces. There was a company had a contract in the grading of the receiving yard, and little small things, like installing glass in the towers, and things like that.

Q. But the Southern Pacific Company did the great, great bulk of the work?

A. Oh, yes.

Q. When did Southern Pacific forces go in on this newly regraded area to commence work on the construction of the classification yard?

A. They went in the latter part of September, 1951.

Q. And what work was done then?

A. They constructed the first three tracks at the north side of the classification yard, tracks 1, 2, and 3. They had been completed with that portion before the main lines were taken up.

Q. You gave us the date of October 1, 1951. What work was at began on that day?

A. That was when the main line was first operated and when we started taking up the old main line.

Q. After the old main line was taken up, and the grading completed there, what was the next thing done in the course of the work?

[fol. 400] A. Construction of the classification yard.

Q. Here is a photograph, Mr. Turner, which bears the notation, "View looking east from a point at the crest of the hump showing two retarders in place at the base, taken January 7, 1952." Did you have that picture taken?

A. Yes, sir.

Mr. Dunne: I ask this be marked in evidence, if your Honor please.

The Court: Defendant's Exhibit C.

(The photograph last above referred to was by the Clerk then marked Defendant's Exhibit C in evidence.)

Mr. Dunne.

Q. Is this another photograph you had taken on the same date, also looking east, but taken from a point that is a little farther east than Exhibit C?

A. Yes, sir.

Mr. Dunne: We offer this in evidence, please, and ask it be marked Exhibit D.

The Court: Exhibit D.

(The photograph last above referred to was then by the Clerk marked Exhibit D in evidence.)

Mr. Dunne:

Q. Now, Mr. Turner, will you be good enough to step up here and indicate to his Honor what that photograph Exhibit C shows with respect to this mark we put on the diagram, A-1? Where is it looking?

A. It is looking from about this point in this direction (indicating). This tower—you can hardly see it, that little [fol. 401] tower right there; then there is another tower down here. I don't know whether you can see that on here or not,—no, I beg your pardon, this isn't it.

Q. Keep your voice up, Mr. Turner, so the reporter can hear you.

A. Yes, this is the other tower there, you can see that. This tower is this one right here (indicating). You are looking in this direction from right here.

Q. So on Exhibit A, I will put a "C" to indicate Exhibit C, and an arrow to indicate the general direction in which the camera was faced.

A. Yes. And this is the house there, and these tracks down in here are these tracks shown back here.

Q. Now, you can sit down again, Mr. Turner, and with that picture before his Honor, what are the two unconnected and un-completed tracks in the immediate foreground of that picture?

A. They are the two tracks over the hump.

Q. Are those the two tracks by which entrance is gained to the new classification yard?

A. Yes, sir.

Q. They had not been completed and were not connected up until after December, 1951?

A. Yes, they were not.

Q. And this Exhibit D shows substantially the same conditions?

A. Yes.

Q. A little farther east?

A. Yes.

[fol. 402] Q. So that his Honor may have some idea of the contemplated project and what you were working toward, as this project I have two other photographs here which I will show to counsel.

(Photographs handed to Mr. Colley.)

Mr. Dunne: These, your Honor, of course, were taken long after this accident, and they are offered merely as illustrative of the project that was in mind when it was started, so that your Honor may have a visual picture of what they were working toward. These pictures were taken April 25, 1952.

Q. Were these two photographs taken at your general direction, and looking eastward into the classification yard?

A. Yes, they were.

Mr. Dunne: For that limited purpose, your Honor, I offer these in evidence.

The Court: E and F.

(The photographs last above referred to were by the Clerk respectively marked Defendant's Exhibits E and F in evidence.)

Mr. Dunne: I ask your Honor's indulgence for a moment.

(Counsel for defendant conferring.)

Mr. Dunne:

Q. Now, Mr. Turner, prior to the commencement of work on the new classification yard, you indicated to us that there were an east and a west yard at Roseville, and that there was the Antelope Yard and the High Line Yard to the west of where the new classification yard went in?

[fol. 403] A. Yes.

Q. Are those yards still there?

A. They are partially.

Q. This new classification building, then, was not built over any of those old yards?

A. No, an entirely new location. There was no yard in there.

Q. So it was new and additional, in addition to the yards which were there?

A. Yes.

Q. In August of 1951 and earlier than that, you spoke about trains coming in there. Was it into those old yards that the trains came?

A. They came into what had been the old yards, yes. I might clarify that by saying that the east yard and west yard were still intact at that time. There had not been anything done to them.

Q. You say "At that time." What time do you mean?

A. August 1951.

Q. Is that true in October, 1951?

A. That is still true—oh, yes, that was true in October 1951, yes. The Antelope yard and the High Line yard had been made into what will be the ultimate receiving yard by extending part of it and taking up part of it.

Q. But so far as revenue trains were concerned, I mean, any kind of movement except merely the movement of construction material into the classification yard, all of that was handled by old facilities?

A. Yes.

[fol. 404] Q. Until in June of this year the new classification yard for the first time was opened for use?

A. Yes.

Q. I said June. I am incorrect.

A. April.

Q. The first work was in April, April 1, 1952, was it not?

A. Yes.

Q. In April of 1952, how many tracks were opened up?

A. They opened 21 tracks in the classification yard on April 1, 1952, and that was—they were extended in groups on up. The next move was 28, and then 35; and then 42. I don't remember those dates, but they were variously opened up between April 1st and June 2.

Q. In October, and through December, then, so far as the new classification yard was concerned, there was no physical connection with any revenue tracks, was there?

A. No.

Q. And there was no commerce in the yard at any time up until the first of April, 1952, the new classification yard?

A. No.

Mr. Colley? I object to that, your Honor, and move to strike it from the record as a conclusion and opinion, whether there was commerce in the yard. That is a legal conclusion.

Mr. Dunne: If your Honor please, if there is the slightest objection to it, we will withdraw the question and answer.

The Court: I think it does involve a legal conclusion.

[fol. 405] Mr. Dunne: We will withdraw it, your Honor.

Q. Now, in doing this work, Mr. Turner, you were directly in charge of it, the new classification yard, were you not?

A. Yes, sir.

Q. And being so in charge of that work, did you have any connection with the Sacramento Division of the Southern Pacific Company?

A. Well, yes, we had a connection in that we had to coordinate our work with the operation of trains, and we also consulted very freely with Mr. Jennings, the Superintendent of the Sacramento Division, as to what he would like to have done here, there, and the other place.

Q. For the purpose of the record, if I may be permitted leading questions; the Southern Pacific Company as a whole, for the purpose of handling its traffic and its general railroad operations, is divided up into divisions, is it not?

A. Yes, sir.

Q. And that part of the railroad, at least, is—perhaps you better tell me: What part of the railroad is embraced within the Sacramento Division?

A. Lines from Sacramento to Sparks, Nevada, and from Davis north to Gerber, and from Roseville north to Gerber, and such branches as we have up there.

Q. Within what division does Roseville and did Roseville and Antelope and this whole area we are talking about lie so far as ordinary operation of traffic was concerned? [fol. 406] A. Sacramento Division.

Q. In your work, in charge of the construction of the new classification yard, were you a part of the Sacramento Division?

A. No, sir.

Q. To whom did you report?

A. The Chief Engineer.

Q. And located where?

A. San Francisco.

Q. And were your forces, while they were doing this work, a separate project force, or were they Sacramento Division forces?

A. No, they are separate entirely from the division.

Q. And from the first of October on beyond the 19th of December, did you have among your forces working on this new classification yard a gang known as Extra Gang No. 3?

A. Yes, sir.

Q. Now, beginning with October 1, 1951, what gangs did you have working on this new yard, this new classification yard?

A. We had Extra Gang 3, and Extra Gang 12, and Extra Gang 17 and Extra Gang 18.

Q. Were those all your gangs, gangs on your particular work?

A. They were all under my jurisdiction, yes.

Q. Did you organize them?

A. I organized two of them, extra gangs 17 and 18.

Q. Where did you get the other gangs?

A. The other two were assigned to me from the Sacra- [fol. 407] mento Division.

Q. So that these gangs come over into a new area, new division of operation as it were, is that right?

A. Yes.

Q. And that was on this classification yard?

A. Yes.

Q. And their work, then, was all work of new construction of the classification yard?

A. Yes, sir.

Mr. Dunne: Mr. Wulff has a matter we wanted cleared up, if your Honor please. I was about to ask the reporter to see if he could find it. If your Honor takes the morning recess, we might do that during the morning recess.

The Court: Very well, we will take a recess for ten minutes.

(Recess.)

Mr. Dunne: If your Honor please, may I have two portions of the record read to the witness?

The Court: Very well.

Mr. Dunne: Toward the end of his direct examination where he referred to trains coming in August, 1951. Page 491 of the notes, Mr. Reporter.

Mr. Colley: Your Honor, I am going to object to this. If there is any question counsel wishes to ask the witness on cross examination, he can ask it, but I see no useful purpose in reading to the witness testimony heretofore given.

The Court: Overruled.

(The record was then read by the reporter as follows:)

[fol. 408] "Q. About when was the first time any freight trains started entering the retarder yard?

"A. The first freight trains started entering the part of the project, the new project, in August, 1951."

Mr. Dunne:

Q. In August, 1951, did any trains start entering the classification yard?

A. No, sir.

Q. In using this word "project," in August 1951, when you say "project", what part of the yards did the trains enter?

A. The receiving yard.

Q. Where is that located with respect to these marks you have made on this map?

A. It is located west of the first mark.

Q. Which is A-1?

A. A-1; it is west of there.

Q. And those were old yards that had been there for a long time?

A. Part of them had been there. They were extended and a little bit taken up.

Q. Some work had been done in preparation of eventually hooking them up with the classification yard?

A. Yes. In August 1951 the receiving yard was completed, and that was used for switching operations.

Q. When you used the word "project" you are including the old yards used as receiving and departure yards and the new classification yard?

A. The entire project includes receiving yard, classification yard, and the departure yard.

[fol. 409] Q. There was no connection, then, between the receiving yard and the classification yard?

A. I beg your pardon?

Q. There was no track connection——

A. Not at that time, no.

Q. Not until January, 1952?

A. It was not until April, 1952.

Mr. Dunne: I have no further questions.

Mr. Colley: Just one or two additional questions, Mr. Turner.

(The witness was then taken for redirect examination by Mr. Colley.)

Redirect examination.

By Nathanial S. Colley, Esq., counsel on behalf of Plaintiff;

Q. You said the receiving yard was completed in August, 1951?

A. Yes, sir.

Q. When you say "completed" you mean you made a few track extensions in the receiving yard, is that right?

A. We extended on the west end and a small portion on the east end was abandoned.

Q. When did you make that extension?

A. The extension was made between May, 1951 and August, 1951.

Q. Now, we have referred to a receiving yard and a classification yard and a retarder yard. Am I to understand you that the retarder yard, the entire project, is made up of a receiving yard and a classification yard?

[fol. 410] A. And a departure yard.

Q. And a departure yard?

A. Yes, that is right.

Q. In other words, the retarder yard is a general name for this entire project?

A. Yes, sir.

Q. Made up of three parts?

A. Yes, sir.

Q. Receiving yard, classification and departure?

A. Yes, sir.

Q. Now, all of these three parts of your general project or retarder yard are connected by rail, is that correct?

A. Yes, sir.

Q. A word or two about where your got your labor from to construct this project: I think you testified on cross examination you organized two gangs, two extra gangs, and the others were assigned to you from some other source, is that correct?

A. Yes, sir.

Q. These other two were assigned to you from where?

A. From the Sacramento Division.

Q. That is an operating Division, is that correct?

A. Yes, that is correct.

Q. And that is the same operating division which extends eastward to Sparks, Nevada, is that correct?

A. That is correct.

Q. Do you know anything about how the Sacramento Division recruited these extra gangs?

A. They were all recruited through a labor representative [fol. 411] here in Sacramento.

Q. Do you know where the extra gangs lived at night, if the company provided their living quarters?

A. They live in outfit cars.

Q. Where?

A. Outfit cars.

Q. Outfit cars at a camp in Rocklin, is that correct?

A. Extra Gang 3 was at Rocklin, yes.

Q. Extra Gang 3 lived at Rocklin, California?

A. Yes,

Q. About how far is that from Roseville?

A. About three miles.

Q. And to get from Rocklin to the new retarder yard project, you go by rail, ordinarily?

A. By truck.

Q. By truck. And did trucks bring your men to work every morning and did they go back by truck every afternoon?

A. Yes.

Q. When you say "truck" you mean motor truck that runs on the highway?

A. On the highway, yes.

Q. So far as you know, they never went by push car, or any such rail transportation?

A. No.

Mr. Colley: I have no further questions.

Mr. Dunne: That is all, Mr. Turner.

Mr. Colley: At this time, the Plaintiff will be called, your Honor. It will be necessary for Mr. Moreno, the [fol. 412] plaintiff, to speak through an interpreter. We have Dr. Regalado, who is the official Court Interpreter of the Spanish language into the English language, and we would like him sworn also to interpret.

(E. C. Regalado was then sworn as interpreter, to translate from the English language into the Spanish language, and vice versa.)

(Epimenio Moreno, the Plaintiff here, was then called and sworn as a witness in his own behalf.)

Testimony of EPIMENIO MORENO, plaintiff, a witness produced in his own behalf, Sworn:

Direct examination.

By Nathaniel S. Colley, Esq., Counsel on behalf of Plaintiff:

Q. Will you state your name, please.

A. (Through Interpreter.) Epimenio Moreno.

Q. Where do you live, Mr. Moreno?

A. In Sacramento.

Q. At what address?

A. I do not remember the number.

Q. Do you know the name of the hotel?

A. (Witness producing papers).

Q. Well, that is all right, it is not important. You live in Sacramento, do you not?

A. Yes, sir.

Q. Did you ever have occasion to be employed by the Southern Pacific Company?

A. Yes, sir.

Q. Can you tell us when was the first time you were ever employed by the Southern Pacific Company?

[fol. 413] Mr. Dunne: That is objected to as incompetent, irrelevant and immaterial. I make the objection advisedly, as being without foundation and immaterial, because of information we have on the deposition, your Honor. There was a new employment on the 2nd of October of 1951, and anything prior to that time would be immaterial.

Mr. Colley: May I be heard, your Honor?

The Court: I can't tell yet now whether it is material or not.

Mr. Dunne: Very well, we will withdraw the objection.

The Court: You may have your objection, but I will overrule the objection at this time, subject to materiality being developed.

A. The first time was in 1948.

Mr. Colley:

Q. In what month in 1948?

A. I do not remember the month.

Q. Were you employed a second time?

A. Yes, I went to work the second time for the Southern Pacific.

Q. When was it you went to work for the second time?

A. The same year of 1948, I went to work as a section hand.

Q. You worked as a section hand the same year?

A. Yes, sir.

Q. About how many months passed between the first and second employments in 1948?

A. About two months.

Q. Did you have any further employment with the South-
[fol. 414] ern Pacific Company?

A. Yes, sir.

Q. When was that?

A. In 1949.

Q. About what time in 1949 did you start working for the Southern Pacific Company a third time?

A. I believe it was in January.

Q. For how long a period of time did you work?

A. About four months.

Q. And did you have any further employment at the Southern Pacific Company?

A. Until I came to work at the yard.

Q. And when did you come to work at the yard?

A. The second of October I started working there.

Q. In what year?

A. 1951.

Q. So when you came to work in October, 1951, this was the fourth time you had come back to work for the Southern Pacific Company?

A. Yes, sir.

Q. On the three prior occasions, the three times before the last time, where did you work? What place?

Mr. Dunne: That is objected to as incompetent, irrelevant and immaterial.

The Court: Sustained. This testimony is directed—the testimony of this witness is directed, I take it, only to the issue that the Court is now inquiring into.

Mr. Colley: That is right.

Mr. Dunne: Yes, your Honor.

Mr. Colley: We are not going into the merits of the case.

The Court: I am quite satisfied that all of this prior to [fol. 415] October employment is immaterial, for this inquiry.

Mr. Colley: May I be heard just momentarily? I don't want to extend it, but I would like to say this, that what I am endeavoring to show is that the man had had several intermittent periods of employment as a section hand laborer, without any restriction of duties, and on October 2 he got this same employment, general section hand, and he was subject to the control of his employer to go wherever they directed him to go.

The Court: I am quite certain it would be immaterial whether he got the same employment. Those matters, if they are material at all, should be directed to this particular issue and nothing else.

Mr. Colley: All right.

Q. Where did you report to get a job on October 2, 1951?

A. Camp No. 3, in Rocklin.

Q. Is there where you went and asked somebody for a job?

A. Yes, and they sent me to Sacramento.

Q. Do you know whom you asked at that time for a job?

A. To a timekeeper.

Q. And did you come to Sacramento?

A. Yes, I did come to Sacramento.

Q. Did you bring any papers or anything else given you by the timekeeper?

A. Yes, the timekeeper gave me a paper to bring to Sacramento.

Q. Where, in Sacramento, did you take this paper?

[fol. 416] A. To the office where Jimmy is, and I gave him the paper.

Q. Do you know any other name of Jimmy?

A. No, just by "Jimmy".

Q. Did you go back to the camp area after that?

A. Yes, I went back right away.

Q. And what did you do when you got back?

A. I got there in the afternoon and I started working the following day.

Q. You started working the following day?

A. Yes, sir.

Q. Where did you start working the following day?

A. In Roseville, where they were building the new yard.

Q. Just what did you do in connection with building this new yard?

A. We were picking up materials, and then we were sent to the main yard to tramp ties.

Q. Now, when you say you were sent to the main yard, where do you mean?

The Court: A question here. Did you say to "tramp ties"?

The Interpreter: Yes, your Honor.

The Court: Tramp?

The Interpreter: Tramp ties.

A. Where they were building this new yard, we were getting ties, piling up ties, and getting the place ready for the new construction.

Mr. Colley:

Q. Where were you getting these ties that you were piling up?

A. From the old tracks they were taking up.

[fol. 417] Q. Did you help take them off the old tracks?

A. Yes; some of them, yes.

Q. And these same ties, then, that you took off the old track, you used them in the new track?

Mr. Dunne: That is objected to as leading and suggestive, and putting the answer in the witness' mouth.

The Court: It was leading.

Mr. Colley: I will reframe it, your Honor.

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The Court: All right. In an inquiry at this time along this particular line, I am not too disposed to restrict the examination.

Mr. Dunne: No, your Honor, but I thought that one went a little far.

The Court: Probably a little bit too leading.

Mr. Colley: All right, I will reframe it.

The Court: Yes.

Mr. Colley:

Q. Do you know whether or not any of the ties from the old track went into the construction of the new track?

A. Some of them were used and the others were burned.

Q. How did you determine which ones you could use, and which ones you would burn?

A. I couldn't do that.

Q. Now, you stated some of them you used. Would you go into that a little and tell us what do you mean by some of them you used? Just what did you do with some of them? [fol. 418] A. They were using them in between two new ones.

Q. I didn't understand you. I didn't hear you.

The Court: Would you read it, Mr. Reporter, please?

(Answer read.)

Mr. Colley:

Q. Using them in between two new ones?

A. Yes, sir.

Q. In order that I might understand you clearly, you mean you would take two new cross ties and put them down together, and then the third one would be a used tie, is that right?

A. No, they had two new ones on each side of the old one—or a new one and an old one.

The Court: He means they alternated a new one and an old one.

Mr. Colley: I see.

Q. Two new ones and an old one; is tha the way the new yard was constructed?

A. Yes, they started that way.

Q. Between October and December, did you ever have occasion to work anywhere on the Southern Pacific Company tracks other than in that retarder yard?

A. Yes, for about 15 days we were tramping ties in the new yard.

Q. Well, do I understand you correctly that you only worked 15 days in the new yard?

The Court: Just a minute, your first question was in the retarder yard.

[fol. 419] Mr. Colley: Yes.

The Court: I don't know whether the witness understands what is the retarder yard.

Mr. Colley: Maybe I can just use the words "new yard".

The Court: Retarder yard takes in the whole area.

Mr. Colley: I see the Court's position in that. I withdraw the question.

Q. During the time between October and December of 1951 did you, for any period of time at all, work anywhere for the Southern Pacific Company except in Roseville?

A. Just the yard.

Q. And did you ever work on the main line doing anything?

Mr. Dunne: If your Honor please, I must object to that as leading and suggestive, as an attempt to cross examine his own witness, and as an attempt by leading question to have his witness contradict the testimony he has already given. And I make that advisedly in the light of the deposition.

The Court: I don't know anything about the deposition, but just generally, as it occurs to me at this time, I would sustain the objection.

Mr. Colley:

Q. Did you work anywhere except constructing the new yard? Withdraw the question. Did you do anything except help build the new yard?

Mr. Wulff: Your Honor please, I object to that because he has already testified he was striking ties and things like

that, and that is not building. That is preparing to build. [fol. 420] The Court: I think that might be too narrow a classification.

Mr. Wulff: I don't know if he knows what building is, whether that is preparing for it, or what is it?

Mr. Colley: May I make my offer of proof?

The Court: I am going to overrule that objection.

Mr. Wulff: Very well.

A. Just with the exception of about 15 days there that I worked at the main line.

Mr. Colley:

Q. What did you do for 15 days on the main line?

A. We were lifting and tramping ties.

Q. What do you mean by the "main line"?

A. The main line where the passenger trains run.

Q. While you were employed by the Southern Pacific Company, did you get hurt in some way? I just want a yes or no answer to that, and I don't intend to go into the circumstances of it.

A. Yes.

The Court: With reference to the main line, where the passenger trains run, as the witness said, I don't know whether he means the old one or the new one.

Mr. Colley: All right, I will ask him if the Court has no objection, or the Court may ask him.

The Court: If he knows. Maybe he doesn't know.

Mr. Colley:

Q. Do you know whether or not this main line you referred to was the new main line or an old main line? [fol. 421] A. The old main line.

The Court: The old main line.

Mr. Colley:

Q. You testified a moment ago, I think, that you got hurt.

A. Yes, sir.

Q. Just very briefly would you tell us how you got hurt?

By that I mean, did a train run over you, or just what happened to you?

A. While the crane was carrying a rail, two of us were hanging from each end of the rail to put it in place, and the crane let the rail go before the time, and it fell, and I got hurt.

Q. What kind of crane was this?

Mr. Wulff: You are not seeking to go into——

The Court: Just a minute. I don't think that would be material for the purposes of this particular inquiry.

Mr. Colley: May I make my offer, your Honor? What I am trying to show is whether or not it was a crane on a truck or a crane that ran up and down the railroad tracks. That is what I want to bring out.

The Court: Very well.

A. A crane that runs on the rails.

Mr. Colley:

Q. What kind of wheels, if any, did the crane have?

A. Just like the trains do.

Q. Just like the trains do. Do you know whether that crane was already in the area when you reported to work on October 2, 1951?

A. I don't know whether it was there.

[fol. 422] Q. When you worked 15 days on the main line, do you know whether or not a crane was also used on the main line?

A. No, they did not take it.

Q. They did not take the crane?

A. No, sir.

Q. Where did you live while you worked in Roseville?

A. At Camp No. 3.

Q. Where is Camp No. 3 located?

A. In Rocklin.

Q. That is Rocklin, California?

A. Yes, sir.

Q. How did you get from work each day to Rocklin, where you lived?

A. We were taken in a truck.

Q. Did you go every day by truck?

A. Yes, back and forth by truck.

Q. Do you know whether or not everybody who lived in this camp worked in this same yard with you?

A. It is about 46 men that were at that camp.

Q. Do you know where they all worked?

A. We were all working in the same yard.

Q. Did you pay anything for living in this camp?

Mr. Dunne: That is objected to as immaterial.

Mr. Colley: Will you stipulate it was a Southern Pacific Company camp, maintained and operated by the Company?

Mr. Dunne: I don't know whether it was or not, and I think whether it was or not is entirely immaterial. That is the reason I made the objection.

Mr. Colley: I submit that it is not, on this issue of jurisdiction, where the camp is located, whether or not it is [fol. 423] a company camp all goes to the question of jurisdiction. If he is living in the City in a hotel, that is one thing, but if he is living in a company camp——

The Court: I will permit it. I can't see right now where it would have any materiality, but it may.

Mr. Colley: I will withdraw that question and ask this question:

Q. Do you know whose camp you lived in?

A. Southern Pacific Camp. It was run by a man by the name of Tony.

Q. Where was this camp situated in relation to the main line of the Southern Pacific Company?

A. In the line at Rocklin.

Q. What did this camp consist of? Was it houses, or what?

A. Southern Pacific cars.

The Court: Your prior witness said they lived in outfit cars at Rocklin.

Mr. Colley: That is all. You may cross examine.

(The witness was then taken for cross examination by Mr. Dunne.)

Cross-examination.

By Arthur Dunne, Esq., of counsel on behalf of Defendant:

Q. On December 19, 1951, when you were hurt, as you told us, with this crane and a rail, that was a new rail to be laid in the new yard, wasn't it?

A. Yes, sir.

[fol. 424] Mr. Dunne: No further questions, unless—and this I wish to put to your Honor: We propose to offer, if your Honor please, certain portions of a deposition that was taken. Would your Honor prefer I do that while the witness is on the stand, or make a separate offer of it?

The Court. You will have to lay your foundation.

Mr. Colley: Maybe we can obviate this, your Honor.

The Court: Just a minute. In connection with this last question, it may be material to ascertain whether or not the specific point at which the accident occurred was in the receiving yard or classification yard or in the departure yard.

Mr. Dunne: Yes, your Honor.

Mr. Wulff: I think the deposition will show that.

Mr. Dunne: I think it will, and, if not, I can show it by another witness. I think your Honor's suggestion is a good one. I will go on with this witness.

Q. Mr. Moreno, do you remember going to Mr. Wulff's office in the California State Life Building here in Sacramento? Last Thursday, I think it was—yes, last Thursday, on the 12th of June?

A. Yes, sir.

Q. And Mr. Regalado was there.

Mr. Colley: Your Honor, this is what I had in mind: I am perfectly willing to stipulate Mr. Moreno's deposition was taken, he was duly sworn, he gave answers, and these answers were reproduced by the shorthand reporter, and [fol. 425] and what Mr. Wulff has and what I have is a copy, and if he wants to introduce it in evidence, I will stipulate it may be introduced in evidence without any foundation whatever.

Mr. Dunne: And you were present during the course of the deposition?

Mr. Colley: And I was present during the course of the deposition.

Mr. Dunne: I will accept that stipulation, if your Honor please.

The Court: Very well.

Mr. Dunne: And we will offer from that deposition the portions bearing upon this issue.

The Court: I don't know, we may not be through with the witness yet.

Mr. Dunne: I was going to introduce the deposition, if your Honor please, by offering from and including line 29 on page 6, through line 23 on page 10, and from and including line 26 on page 16, through and including line 11 on page 17.

The Court: I assume there would be no objection to reading from a copy?

Mr. Colley: None whatsoever, your Honor.

The Court: Suppose you read that right into the record.

Mr. Dunne: I shall, if your Honor please. And I am going to ask counsel if he will give me one other stipulation, and that is that the plat which has been marked as Defendant's Exhibit A in evidence here is the same plat as was [fol. 426] referred to on the deposition.

Mr. Colley: That is correct. I stipulate to that.

Mr. Dunne: Then, if I may, if your Honor please—these are the questions put by Mr. Diepenbrock to Mr. Moreno, the witness:

"Q. When did you first start to work for the Southern Pacific Company before your injury in December of 1951?

"A I started to work the second of October.

"Q. You started work the 2nd of October of that year?

"A. Yes, sir.

"Q. And where were you working when you went to work for the Southern Pacific Company on October 2, 1951?

"A. In Roseville.

"Q. Was that with Extra Gang No. 3?

"A. Yes.

"Q. Now, do you remember from about October 9, 1951 until October 30th of that same year where you were working?

"A. We were working at the same yard.

"Q. All right.

"Mr. Diepenbrock: (To Mr. Colley in referring to a long plat or chart:) You haven't seen this?

"Mr. Colley: No. (Mr. Colley examines the above referred to plat.)

"Mr. Diepenbrock: Now, Mr. Colley, let the record show that the defendant has produced a drawing which on the bottom on the right hand side says: "Southern Pacific [fol. 427] Lines Roseville car retarder yard, December, 1949." This is "Registered Mark", isn't it? No, it says this is "Revised March 12, 1951."

"Mr. Colley: "Rev. Mar. 12"; on the first line, "Dec. '47." Under that is: "Rev. Mar. 12, 1951."

"Mr. Diepenbrock: All right. Mr. Colley, for your information you want to see this thing. North is up here, as indicated by the arrow, so that generally speaking, the left end would be on the west end on the ground. Now, in here, and I am pointing to a point on the drawing where it says "Westward Receiving Yard," and below that "Eastward Receiving Yard." Going over to the right there is another area consisting of 49 tracks which is superimposed over what apparently was—superimposed over what apparently—over what is a subdivision map of south Roseville. That is this legend here that I was just indicating. And further, going over to the right hand side of the drawing there is an area with parallel lines on which is marked 'Westward Departure Yard;' and below that 'Eastward Departure yard.'

"Q. (To the witness) Now, Mr. Moreno, will you come up here and look at this drawing, please? Get over on this side where I am.

"Now, Mr. Moreno, I call your attention to the drawing which I have just explained very briefly to your attorney, Mr. Colley, and ask you if you can identify this drawing [fol. 428] as having been a drawing of the so-called 'Retarder Yards' of the Southern Pacific Company in Roseville?

"A. Maybe it is.

"Q. Well, now, Mr. Moreno, each of these lines in here, and I am pointing now with my pencil toward the area marked 'Eastward Departure Yard', is a railroad track; and above here is 'Westward Departure Yard' with the same line drawings on it, and in between is an area here that says 'PFE Ice Plant.' Do you remember the portion of the Retarding Yard which was divided by the PFE Ice Plant in that area?

"A. Yes, but when I was working there putting in new rails they hadn't finished the job of laying the rails.

"Q. Am I to understand your work then was confined to this area in here where—starting from the top or north of the drawing and going to the bottom where it says '49 tracks' that your work from this period of time from October—withdraw that. Am I to understand that at the time of the accident on December 19, 1951, you were working in this area here, which has at the top 'No. 1' and continuing to the bottom, 'No. 49'—that there were 49 tracks in there and that was where you were working at the time?

"A. Yes, but they weren't finished then.

"Q. Well, I understand they weren't finished yet, but my question is: Were you working in that part of the retarder yard that we have just discussed on December 19, 1951, the date of your injury?

[fol. 429] "Q. Very well; you can resume your seat. Now, so far as you can remember, how long was Extra Gang No. 3, of which you were a member, working in this area prior to the date of your injury on December 19, 1951?

"A. When I arrived at this camp they were already working on this job, but I do not know how long they had been working in there.

"Q. By that do you mean that extra gang No. 3, had been working there before you became a part of that gang?

"A. Yes, sir.

"Q. And before you were assigned or directed to Extra Gang No. 3 where had you been working?

"A. I was working in Woodland at the camp.

"Mr. Diepenbrock: Well, I don't think he understands the question. Perhaps it isn't clear enough.

"Q. As I understood your testimony, Mr. Moreno, you went to work for the Southern Pacific Company on October 2, 1951.

"A. Yes, sir.

"Now, how long were you working from October 2, 1951, before you went to work in Extra Gang No. 3?

"A. You mean doing Field work?

"Mr. Diepenbrock: Let us have an off-the-record discussion, maybe we can clear it up.

"(Short discussion off the record.)

"Q. You started to work for the Southern Pacific October [fol. 430] 2, 1951?

"A. Yes.

"Q. You did not start work Gang No. 3 on the 2nd of October?

"A. Yes, sir. I did start work with that gang. When I started work with this gang No. 3 I started working at this new place they were building.

"Q. Then, is it your testimony, Mr. Moreno, on October 2, 1951, when you were employed by the Southern Pacific Company, you were assigned or put to work in this portion of the retarder yard that had 49 tracks in it?

"A. Yes, sir.

"Q. And you worked regularly and continuously in that part of the retarder yard that we have been discussing, from October 2, 1951, to and including December 19, 1951?

"A. Yes, sir.

"Q. And you were not working for the Southern Pacific Company in any other place during that time?

"A. No, sir.

"Q. What were you doing there as a member of Extra Gang No. 3, Mr. Moreno?

"A. I was tramping ties at first, and then I was laying rails with a jack."

Mr. Dunne: Then the next matter, if your Honor please, goes on to the happening of the particular accident on the 19th.

[fol. 431] The Court: It is 12:00 o'clock now.

Mr. Wulff: There is some more here later on.

The Court: Yes. Recess until 1:30.

(A recess was then taken to 1:30, P.M. of the same day, Wednesday, June 18, 1952.)

[fol. 432] AFTERNOON SESSION

The Court: You may proceed.

Mr. Dunne: Your Honor please, at the noon recess I had just concluded reading through the first portion of this deposition which we offered, and I had concluded line 23 on page 10. For the sake of accuracy, I should enlarge the other portion, make it start, line 25 on page 16 and end on line 13, page 17:

"Mr. Diepenbrock: Just one or two more questions.

"Q. As I understand your testimony, during the entire period commencing with October 2, 1951 and ending on December 19, 1951, all of your activities while working for that company were confined to this portion of the Roseville yard which I am indicating now by my pencil and which your counsel and I have previously indentified as being this area which is superimposed on a portion of a map of the subdivision of South Roseville, is that correct?

"A. Yes, sir.

"Mr. Diepenbrock: I think that is all.

"Mr. Colley: Just one or two things I want to clear up:

"Q. Did it ever happen that you were called upon to go out on to the main line to help clear away a wreck or to do anything else in this period during October 2nd to December 19th?

"A. No, sir.

[fol. 433] "Mr. Diepenbrock: I have nothing else."

(And that closed the deposition.)

Mr. Wulff: We rest, your Honor.

Mr. Dunne: Did you have anything further, Mr. Colley?

Mr. Colley: No, I have nothing further.

Mr. Dunne: That is the matter, then, your Honor.

Mr. Colley: I suppose the Court wants some argument.

The Court: Do you wish to argue orally?

Mr. Dunne: We will adjust ourselves entirely to counsel's wishes.

The Court: I think I would like to hear oral argument.

(Argument by counsel for plaintiff and counsel for defendant.)

[fols. 434-614] Reporter's Certificate to foregoing transcript omitted in printing.

[fols. 615-616] IN SUPREME COURT OF CALIFORNIA, SACRAMENTO COUNTY

Sacramento No. 6520

Hon. J. O. Moncur, Judge

EPIMENIO MORENO, Plaintiff & Appellant,

vs.

SOUTHERN PACIFIC CO., a Corp., Defendant & Respondent

For Resp.: Devlin, Diepenbrock & Wulff, 926 "J" Street, mento.

For Resp.: Devlin, Diepenbrock & Wul:, 926 "J" Street, Sacramento.

DOCKET ENTRIES

July 30, 1954. Transferred to Supreme Court, Dec. 11, '52, Filed transcript Cl, R2, Appeal from J.

August 3, 1954. Lodged Exhibits Pltfs. 1 thru 5 incl. Defts. A, B, C & D.

Nov. 1, 1954. Ordered on Bank Calendar, San Francisco, Dec. 6, 1954.

Nov. 24, 1954. Filed So. Pac. Co. memo of oral argument.

Dec. 6, 1954. Causes called. Arthur B. Dunne argued for appellant and respondent Southern Pacific Company in all five cases. Mr. Hildebrand and Mr. Probst argued for

respondent Gileo in S.F. 19690. Thomas G. Perkins argued for appellant Eufrazio in SAC 6522. Mr. Colley argued for appellant Moreno in SAC 6520 and for respondent Aranda in SAC 6521. Mr. Scalora waived oral argument for appellant Eelk in SAC 6523. Submissions deferred.

April 29, 1955. Submitted.

April 29, 1955. The judgment is reversed with directions to enter judgment for plaintiff in accordance with the verdict.

Gibson, C. J.

We concur: Shenk, J., Edmonds, J., Carter, J., Traynor, J., Schauer, J.

May 31, 1955. Remittitur issued.

[fol. 617] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA, IN BANK

EPIMENIO MORENO, Plaintiff and Appellant,

v.

SOUTHERN PACIFIC COMPANY, a Corporation, Defendant and Respondent

OPINION—April 29, 1955

Plaintiff appeals from a judgment against him in an action brought under the Federal Employers' Liability Act to recover damages for injuries he sustained while working for defendant railroad company. The court, sitting without a jury, took evidence on the question of whether the federal act applied and the case then proceeded to trial before a jury on the other issues. A verdict was returned for plaintiff, but the court entered judgment notwithstanding the verdict on the ground that there was not sufficient evidence of negligence.

The first question presented is whether the Federal Employers' Liability is applicable. Plaintiff started working [fol. 618] for defendant on October 3, 1951, and was injured on December 19, while laying rails in a retarder yard which defendant was constructing for the purpose of facilitating

the movement of freight trains by means of a new method of "switching" and classifying railroad cars. The yard was to be used in connection with defendant's main line of track and was opened to interstate traffic four months after plaintiff's injury.

Federal coverage has been extended to an employee laying tile in a sewer which, when finished, was to be connected to a "roundhouse" where engines moving in interstate commerce were serviced. (Jordan v. Baltimore & Ohio R. Co. [W. Va.], 62 S. E. 2d 806.) The act has also been held applicable to an employee laying rails on a new section of roadbed which, upon completion, was to be used in connection with the main line of track carrying interstate commerce. (Agostino v. Pennsylvania R. Co., 50 F. Supp. 726.) The court in the Agostino case stated that "the construction work, while new, was only an improvement such as an extension, alteration, replacement or repair. . . ." (59 F. Supp. at 730.)

In the present case, the construction was new, but the yard was intended as a substitute for the existing method [fol. 619] of switching and classifying railroad cars. The proper designation of the work, however, is not important since the applicability of the act depends on whether an employee's duties further interstate commerce or affect it "in any way directly or closely and substantially." (Gileo v. Southern Pacific Company, ante, p. ; 45 U. S. C. A. § 51.) We are of the view that, under the circumstances involved here, plaintiff's duties furthered interstate commerce. He is, therefore, considered to have been employed by defendant in that commerce and is entitled to the benefits of the act. (Gileo v. Southern Pacific Company, ante, p. —.)

The question remaining is whether there is substantial evidence supporting the implied finding of the jury that defendant was negligent. At the time of the accident, plaintiff was working as a member of a crew of three men. One of the men would operate a crane to lift a rail, and, while it was suspended horizontally, plaintiff and the other man would each take hold of one of its ends and guide it laterally until it was in the desired position over the roadbed on which it was to be laid. The crane operator would then be

notified by signals to lower it. As plaintiff was guiding one end of a rail he slipped on a piece of metal and fell. The rail, which was suspended about three feet above the [fol. 620] ground, dropped and struck his foot. No lowering signal had been given, and the rail came to rest 18 inches away from the point where it should have been laid. There is testimony that the crane operator could see plaintiff "at all times," and it may reasonably be inferred from the evidence that the rail which struck plaintiff was lowered prematurely due to the negligence of the crane operator.

The judgment is reversed with directions to enter judgment for plaintiff in accordance with the verdict.

Gibson, C. J.

We concur: Shenk, J., Edmonds, J., Carter, J., Traynor, J., Schauer, J.

[fol. 621] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SAC No. 6520

EPIMENIO MORENO, Plaintiff & Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, Defendant & Respondent

On Appeal from the Superior Court in and for the County of Sacramento

JUDGMENT—April 29, 1955

The above entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered,

It Is Ordered, Adjudged, and Decreed by the Court that the Judgment of the Superior Court in and for the County of Sacramento in the above entitled cause, be and the same is hereby reversed, with directions to enter judgment for plaintiff in accordance with the verdict.

Appellant to recover costs on appeal.

I, William I. Sullivan, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 29th day of April, 1955, and now remaining of record in my office.

Witness my hand and the seal of the Court, affixed at my office, this 31st day of May, A. D. 1955.

William I. Sullivan, Clerk, by Paul Dinoia, Deputy.

[fol. 622] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 623] In Superior Court of Sacramento County

Hon. Jay L. Henry, Judge Presiding

No. 88793

Epimenio Moreno

vs.

Southern Pacific Co.

Notice of Motion and Order to Proceed to Trial of Special Defense Before Trial of Any Other Issue, Pursuant to Section 597, Code of Civil Procedure—June 2, 1952

Counsel Horace B. Wulff of the law firm of Devlin, Diepenbrock & Wulff appeared on behalf of the defendant and moving party herein. Counsel N. S. Colley appeared on behalf of the plaintiff in opposition to said motion. Thereupon said motion was argued and submitted to the court by respective counsel and the Court being fully advised orders that the defendant's motion be granted, and the Court further ordered that the Special Defense be tried before the Court and immediately following Court's decision then above cause proceeded by trial by jury. Case heretofore set for trial on Wednesday, June 18, 1952, at 10 A.M.

[fol. 624] Clerk's Certificate in foregoing paper omitted in printing.

[fol. 625] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SACRAMENTO

Dept. Four

[Title omitted]

ORDER ON JURISDICTION—June 23, 1952

The above entitled cause having been heretofore duly and regularly heard, argued and submitted to the Court by respective counsel and the Court ordered submitted, and now on this day the Court being fully advised in the premises made the following order, to-wit:

"Court Determines It Has Jurisdiction in Said Action."

[fol. 626] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 627] IN THE DISTRICT COURT OF APPEAL, STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT

EPIMENIO MORENO, Plaintiff and Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, Defendant and Respondent

3 Civil No. 8363

CERTIFICATE OF CLERK

I, L. A. Endres, Clerk of the District Court of Appeal, State of California, Third Appellate District, do hereby certify as follows:

The above entitled action was appealed to the above entitled Court from the Superior Court of the State of California in and for the County of Sacramento; briefs

were thereafter filed in this Court by the parties to said action and said action was, by stipulation of the parties and Order of Court set down for oral argument and was argued before the above entitled Court upon the same day that argument was had in *Roque Aranda* v. *Southern Pacific Company*, 3 Civil No. 8388, *Albert Eufrazia* v. *Southern Pacific Company*, 3 Civil No. 8428, and *Charles Eelk* v. *Southern Pacific Company*, 3 Civil No. 8481. Prior [fol. 628-630] to submission of the above entitled cause and prior to any decision, judgment or opinion by the above entitled Court the above entitled action was, by Order of the Supreme Court of the State of California, transferred to the Supreme Court of the State of California and the file in said action was thereupon transmitted to the Clerk of the Supreme Court of the State of California.

There is no decision or opinion or judgment of the above entitled Court in the above entitled cause.

Witness my hand and the seal of the Court this 21st day of June, 1955.

L. A. Endres, Clerk of the District Court of Appeal, State of California, Third Appellate District.

[fols. 631-632] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SACRAMENTO

No. 87250

ROGUE ARANDA, Plaintiff & Respondent

vs.

SOUTHERN PACIFIC COMPANY, Defendant & Appellant

Clerk's Transcript on Appeal

Appeal from the Judgment of the Superior Court of the State of California in and for the County of Sacramento

Hon. Grover W. Bedeau, Judge

APPEARANCES:

Nathaniel S. Colley, 421½ L Street, Sacramento, California. Counsel for Plaintiff and Respondent.

Devlin, Diepenbrock & Wulff, 1212 Calif. State Life Bldg.,

Sacramento 14, California. Counsel for Defendant and Appellant.

[fol. 633] In Superior Court of Sacramento County

Complaint—Filed July 16, 1951

Comes now plaintiff above named and for cause of action alleges:

I

That at all times mentioned herein defendant, Southern Pacific Company, was and is now, a corporation organized and existing under and by virtue of the laws of the State of Delaware, and duly authorized and engaged in doing business in the State of California; that said defendant is now, and at all times mentioned herein has been, engaged in the business of operating in inter-state commerce a series of railroad trains for the hauling of passengers and freight for hire as a common carrier; that in connection with this said business defendant maintained and operated in the City of Sacramento, County of Sacramento, State of California, certain railroad yards, shops, repair shifts and foundries, and on the 12th day of June, 1950, employed plaintiff as one of its workers in one of its said foundries; that at all timse mentioned herein plaintiff was working within the course and scope of his said employment.

II

That on or about the 12th day of June, 1950, while plaintiff was employed as aforesaid in defendant's wheel foundry where wheels for defendant's inter-state trains were made and repaired, the defendant Southern Pacific Company, its agents, servants and employees, so negligently operated and maintained a certain crane of said defendant [fol. 634] that the cable of said crane slipped and failed to properly function, thereby causing to be spilled upon the foot of plaintiff a ladle of molten hot metal which was then and there being moved by plaintiff and other employees of defendant to a place and for a purpose designated by defendant.

III

That because of the negligence of defendant aforesaid, plaintiff's foot and leg were severely burned and permanently injured, and plaintiff underwent severe pain, fright and shock to his nervous system, loss of earning power, and suffered a general weakening in his health, strength and activity, all to his damage in the sum of $20,000.00.

IV

That by reason of the aforesaid negligence of defendant plaintiff was confined to a hospital for a period of approximately two months at an expense to him in the sum the exact amount of which he does not now know; that plaintiff has required the services of physicians and surgeons and because of his injuries herein, shall require such services for a long time to come; that the estimated cost of past and future medical care and treatment herein to plaintiff is the sum of $2,000.00.

Wherefore, plaintiff prays judgment for the sum of $22,000.00 plus cost of suit herein and such other and further relief as to the court seems just and proper.

Nathaniel S. Colley; Attorney for Plaintiff.

[fol. 635] [Title omitted]

Duly sworn to by Rogue Aranda. Jurat omitted in printing.

[fol. 636] In Superior Court of Sacramento County

Answer—Filed August 22, 1951

Now comes the defendant Southern Pacific Company and answering the first alleged cause of action set forth in the first amended complaint of plaintiff on file herein admits, denies and alleges as follows, to-wit:

I

Answering the first Paragraph of the first alleged cause of action, the defendant avers that it is now and at all times

mentioned herein has been engaged in the manufacturing of railroad car wheels and other parts of railroad cars as well as being engaged in the business of a common carrier by rail for the hauling of passengers and/or freight for hire in both interstate and intrastate commerce and that as a part of its said business of manufacturing railroad car wheels the defendant maintains a wheel foundry in the City of Sacramento, County of Sacramento, State of California, and that at the time mentioned in said complaint the defendant employed plaintiff as a molder's helper and as such was employed exclusively in the construction of new railroad car wheels, and was not employed in interstate commerce.

III.

Denies each and every, all and singular, the allegations set forth in Paragraphs II, III and IV of said first alleged cause of action and in further answer to said Paragraphs, this answering defendant denies that by any matter or thing alleged in said Paragraphs II, III and IV of plaintiff's first alleged cause of action, of said complaint, or [fol. 637] otherwise, plaintiff has been damaged or injured in the alleged or any amount or manner or at all.

Answering the second alleged cause of action set forth in said complaint, this defendant admits, denies and alleges as follows, to-wit:

I.

Answering Paragraph I of said second alleged cause of action, defendant refers to Paragraphs I and II of its answer to the first alleged cause of action and by such reference makes said Paragraphs I and II a part of this answer to the same extent as though said Paragraphs were fully set forth herein.

II

Denies each and every, all and singular, the allegations set forth in Paragraph II of said second alleged cause of action, and in further answer to said Paragraph, this answering defendant denies that by any matter or thing alleged in said Paragraph II of plaintiff's second alleged cause of action of said complaint, or otherwise, plaintiff has

been damaged or injured in the alleged or any amount or manner or at all.

Answering the third alleged cause of action set forth in said complaint, the defendant admits, denies and alleges as follows, to-wit:

I

Answering Paragraph I of said third alleged cause of action, defendant refers to Paragraphs I and II of its answer to the first alleged cause of action and by such [fol. 638] reference makes said Paragraphs I and II a part of this answer to the same extent as though said Paragraphs were fully set forth herein.

II

Denies each and every, all and singular, the allegations set forth in Paragraph II of said third alleged cause of action, and in further answer to said Paragraph, this answering defendant denies that by any matter or thing alleged in said Paragraph II of plaintiff's third alleged cause of action of said complaint, or otherwise, plaintiff has been damaged or injured in the alleged or any amount or manner or at all.

As and for a second, further and separate defense to the alleged causes of action set forth in said complaint, and without prejudice to the defense hereinabove set forth, defendant avers:

That at the time and place mentioned in said complaint on file herein, plaintiff so negligently and carelessly conducted himself in and about his work as a moulder's helper as to cause himself to be burned by hot metal and that all injuries and/or damages suffered by plaintiff were caused and contributed to by said negligence and carelessness of plaintiff.

As and for a third, further and separate defense to the alleged causes of action set forth in said complaint, and without prejudice to the defense hereinabove set forth, defendant avers:

That at the time and place mentioned in said complaint on file herein, plaintiff so negligently and carelessly con- [fol. 639] ducted himself in and about his work as a molder's helper as to cause himself to be burned by hot metal and

that the sole proximate cause of any and all injuries and or damages suffered by plaintiff was the said negligence and carelessness of said plaintiff.

Wherefore, defendant prays that plaintiff take nothing by his said complaint, and that it be hence dismissed and defendant recover its cost of suit herein incurred.

Dated August 16, 1951.

(S.) Devlin, Diepenbrock & Wulff, Attorneys for Defendant.

Duly sworn to by Roy G. Hillebrand. Jurat omitted in printing.

[fol. 640] [File endorsement omitted]

AFFIDAVIT OF SERVICE BY MAIL (Omitted in Printing)

[fol. 641] IN SUPERIOR COURT OF SACRAMENTO COUNTY

FIRST AMENDED COMPLAINT—Filed December 6, 1951

Comes now plaintiff above named, as of course, and files this his First Amended Complaint herein:

First Cause of Action

That at all times mentioned herein defendant, Southern Pacific Company, was, and is now, a corporation organized and existing under and by virtue of the laws of the State of Delaware, and duly authorized and engaged in doing business in the State of California that said defendant is now, and at all times mentioned herein has been, engaged in the business of operating in inter-state commerce a series of railroad trains for the hauling of passengers and freight for hire as a common carrier; that as a part of its said business defendant maintains and operates in the City of

Sacramento, County of Sacramento, State of California, certain railroad yards, repair shops and foundries, and on the 12th day of June, 1950, employed plaintiff as one of its workers in one of its said foundries; that at all times mentioned herein plaintiff was working within the course and scope of his said employment.

II

That on or about the 12th day of June, 1950, while plaintiff was employed as aforesaid in defendant's wheel foundry where wheels for defendant's interstate trains were made and repaired, the defendant Southern Pacific Company, its agents, servants and employees, so negligently operated a certain crane of said defendant that the cable of said crane slipped and failed to properly function, thereby causing to be spilled upon the foot of plaintiff a ladle [fol. 642] of molten hot metal which was then and there being moved by plaintiff and other employees of defendant to a place and for a purpose designated by defendant.

III

That because of the negligence of defendant aforesaid, plaintiff's foot and leg were severely burned and permanently injured, and plaintiff underwent severe pain, fright and shock to his nervous system, loss of earning power, and suffered a general weakening in his health, strength and activity, all to his damage in the sum of $20,000.00.

IV

That by reason of the aforesaid negligence of defendant plaintiff was confined to a hospital for a period of approximately two months at an expense to him in the sum the exact amount to which he does not know; that plaintiff has required the services of physicians and surgeons and because of his injuries herein, shall require such services for a long time to come; that the estimated cost of past and future medical care and treatment herein to plaintiff is the sum of $2,000.00.

Second Cause of Action

I

Plaintiff refers to Paragraphs I, III and IV of his First Cause of Action and by such reference makes them a part hereof.

II

That on or about the 12th day of June, 1950, while plaintiff was employed as aforesaid in defendant's wheel foundry where wheels for defendant's interstate trains were [fol. 643] made and repaired, the defendant Southern Pacific Company, its agents, servants, and employees, so negligently maintained a certain crane of said defendant in such a dangerous, defective and unsafe condition that the cable of said crane slipped and failed to properly function, thereby causing to be spilled upon the foot of plaintiff a ladle of molten hot metal which was then and there being moved by plaintiff and other employees of defendant to a place and for a purpose designated by defendant.

Third Cause of Action

I

Plaintiff refers to Paragraphs I, III and IV of his First Cause of Action, and by such reference makes them a part hereof.

II

That on or about the 12th day of June, 1950, while plaintiff was employed in defendant's wheel foundry where wheels for defendant's interstate trains were made and repaired, the defendant, Southern Pacific Company, its agents, servants and employees, failed to provide plaintiff with a safe place to work; in that said defendant required plaintiff to work too close to exposed and uncovered hot liquid metal being moved by cranes.

Wherefore, plaintiff prays judgment against defendant for the sum of $22,000.00 plus cost of suit herein and for

such other and further relief as to the court seems just and proper.

(S.) Nathaniel S. Colley, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 644-646] In Superior Court of Sacramento County

Motion for Order Granting Leave to File Amendment to Answer—Filed April 30, 1952

To the above named plaintiff and to his attorney, Nathaniel S. Colley, Esq.:

You and each of you will please take notice that the above named defendant will move the above entitled court for an order granting it leave to file an amendment to its answer at the hour of 10:00 o'clock A.M., on Wednesday, the 7th day of May, 1952, or as soon thereafter as counsel may be heard, in the Courtroom of the above entitled Court, situated in the City of Sacramento, County of Sacramento, State of California. A copy of such proposed amendment is hereto attached and marked Exhibit "A" and by reference thereto made a part hereof.

This motion will be made upon the ground that the subject matter of said amendment to answer is necessary to set forth before the court and jury all defenses of said defendant and in support of this motion the defendant will rely upon this motion and all documents on file in the above entitled matter.

Dated: April 30, 1952.

(S.) Devlin, Diepenbrock & Wulff, Attorneys for Defendant.

Affidavit of Service by Mail (omitted in printing)

[fol. 647] *Duly sworn to by Horace B. Wulff. Jurat omitted in printing.*

[fol. 648] [File endorsement omitted.]

[fol. 649] In Superior Court of Sacramento County

Amendment to Answer—Filed May 7, 1952

Now comes the above named defendant and with leave of court first had and obtained files this amendment to its answer setting forth an additional separate defense, that is:

As and for a fourth, further and separate defense and as an off-set to all of the alleged causes of action set forth in said defenses heretofore set forth, this defendant avers: That this defendant did, periodically during the period commencing on June 12, 1950, and ending on May 16, 1951, pay to the plaintiff and said plaintiff accepted as compensation under the California Labor Code the sum of Thirty Dollars ($30.00) per week for said period, or a total sum of One Thousand Four Hundred Forty-eight and 57/100ths Dollars ($1,448.57) on account of any and all personal injuries or loss or damage suffered by plaintiff on June 12, 1950, while engaged in the performance of his duties as a molder's helper, that is, on account of any and all personal injuries or loss or damage that the plaintiff is seeking to recover by his complaint in the above entitled matter; that at any time after the filing of plaintiff's said complaint, plaintiff did not reimburse said defendant or return to said defendant said sum of One Thousand Four Hundred Forty-eight and 57/100ths Dollars ($1,448.57) or any part thereof, and that said plaintiff still retains said sum, and all thereof.

Wherefore, this defendant prays, in addition to the reliefs prayed for by its prayer to its original answer, [fol. 650] that the sum of One Thousand Four Hundred Forty-eight and 57/100ths Dollars ($1,448.57), together with interest thereon at the rate of seven percent (7%) per annum from said May 16, 1951, be off-set against any judgment that may be entered in plaintiff's favor in the above entitled action, and for such other relief as to the court may seem meet and proper.

Dated: May 7, 1952.

(S.) Devlin, Diepenbrock & Wulff, Attorneys for Defendant.

Duly sworn to by Horace B. Wulff. Jurat omitted in printing.

[fol. 651] [File endorsement omitted.]

[fol. 652] IN SUPERIOR COURT OF SACRAMENTO COUNTY

ORDER DENYING MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT—June 23, 1952

The above matter having been heretofore heard and submitted it is ordered that the Motion for a Judgment Notwithstanding the Verdict heretofore made herein be and the same is hereby denied and It Is Further Ordered that the Judgment heretofore stayed and postponed be entered herein.

[fol. 653] IN SUPERIOR COURT OF SACRAMENTO COUNTY

JUDGMENT ON VERDICT—June 23, 1952

This cause came on regularly for trial N. S. Colley & M. Sakuma appearing as counsel for the plaintiff, and H. Wulff & V. Diepenbrock, of the firm of Devlin, Diepenbrock & Wulff for the defendant.

Thereupon, a jury of 12 persons was duly accepted, empaneled and sworn to try said cause. Witness of the part of the plaintiff and defendant were duly sworn and examined.

Whereupon, after hearing the evidence, the arguments of Counsel and instructions of the Court, the cause was submitted to the jury who retired to deliberate upon their verdict, and subsequently returned into court, and, being called, all answered to their names, and then rendered the following verdict, which was accepted by the Court and entered on the minutes, as follows: In the Superior Court of the State of California in and for the County of Sacramento, No. 87250, Dept. 2, Roque Aranda, Plaintiff, vs. Southern Pacific Company, Defendant.

VERDICT

We the Jury in the above entitled action find for the Plaintiff and against the Defendant Southern Pacific Company and assess Plaintiff's damages in the sum of $12,000.00, less the sum of $1448.57 heretofore paid by defendant to plaintiff. The net amount awarded is $10,551.43.

Albert G. Puliz, Foreman.

[fol. 654] Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged, and decreed, that Roque Aranda plaintiff do have and recover from Southern Pacific Company defendant, the sum of Ten thousand five hundred fifty one and 43/100 Dollars ($10,551.43) with interest thereon at the rate of seven per cent per annum from the date hereof, till paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of $120.80.

[File endorsement omitted.]

[fol. 655] IN SUPERIOR COURT OF SACRAMENTO COUNTY

NOTICE OF APPEAL—Filed August 19, 1952

To the Clerk of the above Entitled Court:

You will please take notice that the Southern Pacific Company, a corporation, defendant in the above entitled action, hereby appeals to the District Court of Appeal of the State of California, Third Appellate District, from the following orders, judgments and decrees rendered in said action by the above entitled Court:

1. From the Order denying said defendant's motion for judgment notwithstanding verdict, which motion was made before the entry of judgment, said order being dated the 23rd day of June, 1952;

2. From the whole of the judgment in said action rendered in favor of plaintiff and against the defendant Southern Pacific Company, a corporation, and entered on the 23rd day of June, 1952, in Book 117 of Judgments, at

Page 270, of the records of the Superior Court of the State of California, in and for the County of Sacramento.

Dated: August 19th, 1952.

Devlin, Diepenbrock & Wulff, Attorneys for Defendant, Southern Pacific Company, a corporation.

AFFIDAVIT OF SERVICE BY MAIL (omitted in printing)

[fol. 656] [File endorsement omitted.]

[fol. 657] IN SUPERIOR COURT OF SACRAMENTO COUNTY

NOTICE TO PREPARE CLERK'S TRANSCRIPT—Filed August 19, 1952

To the Clerk of the Above Entitled Court:

Please take notice that Southern Pacific Company, a corporation, the defendant in the above entitled action, having appealed from the order denying motion for judgment notwithstanding verdict and the judgment rendered in the above entitled action, as particularly designated in the Notice of Appeal on file herein, does hereby request that a clerk's transcript be made up and prepared in accordance with Rule 5 of Rules on Appeal and does hereby designate the following papers or records on file or lodged with the clerk, which said defendant desires incorporated in the record on appeal:

1. Complaint of plaintiff;
2. First Amended Complaint of plaintiff;
3. Answer to First Amended Complaint;
4. Defendant's Motion for Order Granting Leave to File Amendment to Answer;
5. Amendment to Answer;
6. All exhibits adduced at the trial of said action, (to be transmitted to the Clerk of the District Court of Appeal, Third Appellate District, in their original Form);
7. Order Denying Motion for Judgment Notwithstand-

ing the Verdict, which order was made on the 23rd day of June, 1952;

8. Judgment in favor of plaintiff and against defendant, entered on the 23rd day of June, 1952;

9. Notice of Appeal;

[fol. 658] 10. Notice To Prepare Clerk's Transcript;

11. Notice to Prepare Reporter's Transcript.

Dated: August 19th, 1952.

Devlin, Diepenbrock & Wulff, Attorneys for Defendant, Southern Pacific Company, a corporation.

Affidavit of Service by Mail (omitted in printing)

[File endorsement omitted.]

[fol. 659] In Superior Court of Sacramento County

Notice to Prepare Reporter's Transcript—Filed August 19, 1952

To the Clerk of the Above Entitled Court:

Please take notice that Southern Pacific Company, a corporation, defendant in the above entitled action, having appealed from the Order Denying Motion for Judgment Notwithstanding Verdict and the Judgment rendered in the above entitled action, as particularly designated in its Notice of Appeal on file herein, does hereby request the preparation of a reporter's transcript of the oral proceedings in said action, of all of the testimony and evidence offered and received in said action, both on the issue of the jurisdiction of the Court and on the trial of the merits, of all of the rulings and statements of the Court; of all of the written or oral instructions, whether given or refused, and, also, of all objections and exceptions of counsel, all to be prepared pursuant to Rule 4 of the Rules on Appeal.

Dated: August 19th, 1952.

Devlin, Diepenbrock & Wulff, Attorneys for Defendant, Southern Pacific Company, a corporation.

Affidavit of Service by Mail (omitted in printing)

[fol. 660] [File endorsement omitted.]

[fols. 661-1040] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 1041] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SACRAMENTO

Department Number Five

Hon. John Quincy Brown, Judge.

No. 87250

ROQUE ARANDA, Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, Defendant

Reporter's Transcript

Tuesday, December 11, 1951

The above entitled matter came on regularly for trial in the Superior Court in and for the County of Sacramento, State of California, in Department Number Five thereof, before Hon. John Quincy Brown, Judge of the Superior Court. The plaintiff was represented by Nathaniel S. Colley, Esq., acting as his counsel; the defendant was represented by Horace B. Wulff, Esq., of counsel on behalf of defendant, acting as its counsel. Edward J. Merrick, Official Phonographic Reporter of the Superior Court, was in attendance upon the court and acting.

The following proceedings were had, to wit:

The Court: Aranda vs. The Southern Pacific Company.

Mr. Wulff: Ready, your Honor.

Mr. Colley: Ready for the plaintiff, your Honor.

The Court: Did you gentlemen have some stipulation that [fol. 1042] you wish to enter into?

Mr. Colley: Yes. Mr. Wulff has raised a point, your

Honor, which we have agreed ought to be disposed of by the Court without a jury, so I suppose we should—do you want that stipulation in open court before the jury is retired? Whatever way you want we will do it that way.

The Court: I think we will call the roll of the jury panel and let them retire. There is not any question, gentlemen, but what there is to be a stipulation to the effect that Mr. Colley has stated?

Mr. Wulff: The stipulation that he has mentioned is to split one issue as to whether or not the Federal Employers Liability is applicable and is to be tried before the Court without a jury, and in the event the matter is not disposed of then the case is relegated back for trial on the merits of the case. That is correct.

The Court: Is that correct?

Mr. Colley: That is correct, yes.

The Court: The clerk will call the roll of the jurors.

(Thereupon roll call of jury panel was had.)

The Court: Now, ladies and gentlemen of the jury, your services will not be necessary in this case this morning. The Court notes that Alice Bryan—Is she present?

Mrs. Bryan: Yes.

The Court: Mrs. Bryan, you have served your fifteen days now and the Court wishes to thank you very much for your [fol. 1043] services at this time and so you are excused. You are excused until further notice, and the Season's Greetings go along with it. The remaining members of the panel will report Thursday, December 13th, at 10:00 o'clock in Department Two. That is next Thursday. You may now retire.

Gentlemen, are there any further amplifications of that stipulation that you wish to have of record at this time?

Mr. Wulff: You might clarify that a bit, don't you think so, Mr. Colley?

Mr. Colley: If you want to amplify it, it makes no difference to me. It seems to me sufficient to say we are just asking the Court to determine the issue of the jurisdiction in the absence of the Jury and the matter is to be submitted to the Court for the decision, after which time if the Court decides in favor of the plaintiff we will go to trial on the merits before a jury on the merits of the case alone and

otherwise, of course, there will be no further proceedings.

The Court: By stipulation of Counsel this matter is now before the Court without a jury, restricted to the matter of the jurisdiction, without a jury.

Mr. Wulff: Or whether the Federal Employers Liability Act is applicable.

Mr. Colley: We are saying the same thing.

The Court: That is part of it.

Mr. Wulff: That is right, I am repeating it because the Court is saying, "Determining the jurisdiction of the [fol. 1044] Court," but I am stating that so that the Court has that language, so that there will be no confusion in the future.

The Court: Very well.

Mr. Colley: Mr. Helsel.

The Court: Are you calling the witness now?

Mr. Colley: I am calling this witness now. I think the record ought to show this witness is being called under 2055.

Mr. Wulff: You can't call him under 2055. He is not an officer. He is an employee. You can't call an employee under 2055.

The Court: The Court doesn't know that.

Mr. Wulff: If you can establish he is an officer of the Company you can do that.

The Court: That will depend on his qualifications or on his authority and status as to whether or not he can be called under 2055.

Mr. Colley: All right.

Testimony of D. L. Helsel, witness called on behalf of Plaintiff, Sworn.

Examination.

By Nathaniel S. Colley, Esq., counsel on behalf of Plaintiff:

Q. Would you state your full name, please?

A. D. L. Helsel.

Q. Do you pronounce that Helsey?

A. Helsel.

Q. What is your occupation?

[fol. 1045] A. I am Chief Clerk in the Store Department.

Q. What company?

A. Southern Pacific Company.

Q. And where are you employed?

A. Sacramento.

Q. And how long have you been employed in that capacity?

A. Oh, about fifteen years.

Q. And you have been Chief Clerk for fifteen years?

A. Yes, sir.

Q. Now, would you describe to us in a general sort of way first of all your duties as Chief Clerk in the Store Department of the Southern Pacific Company in Sacramento?

A. Well, I supervise the clerical operations and physical operations of the Store Department. It is engaged in receiving, disbursing, storing materials that are used by the Railroad.

Q. Do you have a yard or shop in Sacramento? Is there a company yard or shop in Sacramento?

A. Yes, sir.

Q. Is there such a thing as a Sacramento Division or do you have some geographical breakdown with Sacramento as a headquarters?

A. Well, Sacramento Division is in this area, that is right. That is the operating division.

Q. You have no connection with the Sacramento Division?

A. No, we are a different department.

[fol. 1046] Q. In other words, you have nothing to do with the operations of the Sacramento Division?

A. The Sacramento Division is operation of trains. We have nothing to do with that.

Q. But when you say you have nothing to do with it you mean that the Stores Department does not furnish the supplies for the operation of trains in the Sacramento Division?

A. We furnish supplies that may be needed for the railroad.

Q. And that includes trains within this state and trains going outside of the state as well, is that right?

A. Well, our trains—the supplies we furnish go as far as the end of the line.

Q. Where is the end of the line?

A. North at Portland.

Q. North at Portland, Oregon?

A. Yes.

Q. And would you give us the other termination points?

A. East at Ogden.

Q. That is in the State of Utah?

A. Yes, sir.

Q. What about south?

A. That goes to El Paso.

Q. El Paso, Texas?

A. Yes, sir.

Q. The supplies you furnish from the shops and stores in Sacramento go to the ends of the lines at those points outside of California that you have mentioned, is that right?

A. Yes, sir.

Q. Now, those trains go to Portland or El Paso, or Ogden, are they supplied at other points as well as from Sacramento?

[fol. 1047] A. What kind of supplies do you mean, please?

Q. Well, I am coming to that. What kind of supplies do you furnish?

A. Everything that is required for the operation of the railroad with the exception of commissary supplies.

Q. Well, is there another source somewheres on the line where everything necessary for the operation of a railroad except commissary supplies are furnished?

A. Yes, we have several stores on the railroad at supply points.

Q. Well, are those stores on equal footing, if you know, with the Sacramento stores?

A. No, Sacramento is larger than all the points, all the rest of them pretty near put together.

Q. In other words, Sacramento is the main one?

A. That is a general store.

Q. Main general stores for the supplies of material and equipment of the operation of your trains?

A. That is right.

Q. And your activities then in the stores department, directly affect all trains, be they going to Ogden or just to Roseville?

A. Well, the part of material that we furnish for the operation of trains is small, that is, in the way of train supplies. Our function is mainly of furnishing material for maintenance of locomotives and cars, repairing and rebuilding them.

Q. Repairing and rebuilding cars. These cars you refer [fol. 1048] to are cars which run to all those points of termination you have mentioned?

Mr. Wulff: I object to that. It is self-evident that if and until a car is built it wouldn't run.

Mr. Colley: I don't understand the objection.

Mr. Wulff: You are assuming the cars are running and they are not until they are rebuilt.

The Court: He had it in the conjunctive, repairing and rebuilding, both.

Mr. Colley: He said their primary activity is building and repairing cars.

The Witness: Furnish material to build them. We don't build them.

Mr. Colley: But you furnish material required for the repair and building of cars?

A. That is right.

The Court: Then to rule on your question the objection would cover only cars that are capable of running, that is, they are capable of being repaired or under repairs?

Mr. Colley: That is right.

Mr. Colley:

Q. Let us take the repairs first, Mr. Helsel. The cars that you furnish supplies for repairing are those cars which have come in from points outside of California as well as those which have originated inside of California?

A. We furnish all material for any cars that arrive on our line; that includes cars from all railroads.

[fol. 1049] Q. In other words, some of the cars you repair then have come in from Ogden, some in from El Paso, some in from Portland, is that right?

A. All gate-ways, yes, sir.

Q. And you furnish supplies for the repair of those cars. Could you tell us where those cars are repaired?

A. Where they are repaired?

Q. Yes.

A. They are repaired at various car shops on the Southern Pacific lines. We have them located at numerous points.

Q. And one of your major car repair shops is in Sacramento, isn't that right?

A. Well, that is the major rebuilding shop and building shop. That constitutes the majority of our activities. Any heavy rebuilding program, conversion of cars or building new ones is generally carried on here because they are equipped for it.

Q. Yes. Now, when you mentioned heavy duty repairs and rebuilding you mean that sometimes cars come in and they need so much repairs that you withdraw them from running line and send them into the shop and they stay there maybe several weeks and they are repaired and sent back?

A. What do you mean by the "running line"?

Q. Well, you have a car that comes in from say Reno or Ogden or Portland.

A. That is right?

Q. And needs major repair, you have a shop here where you can put it in and withdraw it from the line and let it stay there for a reasonable length of time while it is [fol. 1050] being repaired?

A. That is right, they do that all the time.

Q. And then after it is repaired what happens to the car, if you know?

A. Well, it is turned over to the Operating Department.

Q. That means that that same car frequently returns to Ogden, El Paso or Portland perhaps?

A. Perhaps, yes. It wouldn't necessarily return there. It would be placed in service here and go wherever the car distributor wanted it to go or where they had need for it.

Q. But, take inside the State or outside the State?

A. Of course, our cars are placed at loading points for loading and where they go, of course, we don't know any-

thing about that. That comes under the jurisdiction of the operating department that has to do with movement of trains.

Q. I see. Is the operating department and the stores department located in the same general railroad yard here in Sacramento?

A. No, sir.

Q. You mean then, that for instance the repair yard or stores department is located in one part of the city and the operating department in another part of the city?

A. Operating department for operation of trains is located in the station such as Sacramento here and they have their dispatchers at various points, car distributors. The store departments are generally located in shop grounds adjacent to where the material is used in the [fol. 1051] various locomotives.

Q. Let us confine this to Sacramento now. Your area in the stores department, is that located in a different part of the city from where the operating department is located?

A. Yes, sir.

Q. Where is the stores department located in Sacramento?

A. Well, we have about twelve or fourteen within the shop grounds.

Q. But aren't the shop grounds in the same general enclosure as the railroad station?

A. No, sir. They are located north of it.

Q. Are there any public stores running between the stores department and the railroad station?

A. No, there is fence and tracks running there.

Q. And those are tracks of the Southern Pacific Company?

A. That is right.

Q. In fact, all of the property separating the stores department from the operating department is company property?

A. I presume they own it. I think they do, yes, sir.

Q. Whether they own it or not they have tracks on it and it is within the general area that they control?

requires a pair of wheels that have just worn out through ordinary wear, those wheels are sold to the owner of the car. They pay for those and where the wheels have to be changed on account of our improper handling of the trains, slid flat or something like that the Southern Pacific Company has to pay for that.

Q. In other words, they are paid for except where caused by our own negligence?

A. That is correct.

Q. The other railroad company is billed by you for the value of that wheel?

A. That is right, they are billed by the Southern Pacific Company to the owner of the car.

Q. And that value is a pre-arranged price, is it?

[fol. 1074] A. That is the agreement price set by the Association of American Railroads.

Q. Now, do you also make wheels for other types than for railroad cars?

A. We make a few wheels for shop machinery that is used in an overhead crane or cranes, transfer tables and turntables; they have a special wheel. Some of them are similar in design to an ordinary car wheel but they are a different dimension.

Q. In other words, these wheels we might say are for industrial equipment?

A. That is correct.

Q. That would include cranes and draglines, is that correct?

A. Overhead cranes in shops. No draglines, no, sir.

Q. That would include turntables?

A. Turntables and transfer tables.

The Court: Is that limited to your own shops and your own needs, or do you sell it to other railroads?

A. That is more or less limited to our own needs. We don't sell them to other railroads.

Mr. Wulff:

Q. Now, has it always been the custom of the Southern Pacific Company to sell these wheels to outside users?

Mr. Colley: I am going to object to what the custom of

the Southern Pacific Company might have been or might be now.

Mr. Wulff: I didn't say the custom. Read the question.

[fol. 1075] (Question read by the reporter.)

Mr. Colley: That is the question. I object to it, your Honor.

The Court: I think it is a little far afield. I will sustain it.

Mr. Wulff:

Q. In other words, I cannot go into the nature of the business and why——

The Court (Interposing): He can testify what has been going on as long as he has been there. As long as he knows anything about it, but the word "custom" is a generality.

Mr. Wulff: Prior to 1950, while you were there, had you sold wheels to outside users?

A. Oh, yes, we sold them to Northwestern Pacific Railroad, we have sold them to the Southern Pacific of Mexico, we sold them to the Pacific Fruit Express and small users like the Pacific Coast Aggregates which have their own car equipment and we would furnish them a few wheels from time to time.

Q. What if anything affects the volume of your manufacturing for outside users?

A. Would you repeat that, please?

Mr. Wulff: Read the question.

(Record read by the reporter.)

A. That would be the demand that we have for our own use.

The Court: In other words, your own use comes first?

A. That is correct.

The Court: And if you were filled up you wouldn't go [fol. 1076] ahead with the other, is that correct?

A. That is correct.

The Court: Generally speaking?

A. That is generally the policy of the foundry.

Mr. Wulff: Now, I assume that that same demand regulates the amount of wheels you buy from outside manufacturers?

A. That is correct.

Q. Have you the number of wheels that the Southern Pacific Company purchased in 1950?

A. Yes, sir, there was 10,882.

Q. And for 1951?

A. December 1 there was 10,745.

Q. Is there an independent accounting system maintained relative to the manufacture of wheels by the three foundries of Sacramento?

A. Yes, a foundry is operated on an independent basis, all costs are taken into account to arrive at the production costs of the wheels.

Q. In other words, your department has written requisitions or invoices to cover all materials and supplies, etcetera, that you handle or disburse through the stores department?

A. All of those ingredients and supplies are covered by a transferring document that relieves the stores accounts of the value and charges it to the foundry production and the basis is convenient to accumulate the total supply that is used throughout the month and then make one charge out [fol. 1077] to the foundry. At the end of the month. That is a simplified process to keep from ordering it every day.

Q. Now, do you make any corresponding credit entries relative to the wheels manufactured and turned over to your department?

A. Well, the wheels when they are manufactured and turned over to us, their cost of production is charged to the stores department and they remain in our material balance until such time as they are issued for any purpose that they may be needed. At the time that they are issued we are furnished the requisition for the completed wheel and the using department is charged accordingly.

Q. All right, take the Pacific Coast Aggregates Company, do you make the actual bill or invoice to that company?

A. We make up what we call a work sheet and a bill which gives all the data necessary to prepare the invoice. Our

procedure is for the invoices to be made all on one office, which is done down below. It is a consolidated activity.

Q. And that is also true so far as Northwestern Railroad Company, you spoke about?

A. Same thing, yes, sir.

Q. Did you state the number of wheels which were delivered over to Car Shop Nine for new car manufacturing in 1951?

A. In 1951 there was 27,694 wheels used.

Q. Now, do you know who is billed for those wheels? Also, in 1952.

A. That is billed to the Southern Pacific Equipment Company.

[fol. 1078] Q. And that is a separate corporation?

A. Oh, yes. That is treated just like an outside concern. They are.

Q. The actual accounting system, however, is maintained in San Francisco?

A. That is correct. We furnish the necessary work sheets and documents for them to make the proper accounting.

Q. Now, you spoke about purchasing new wheels from outside manufacturers. Now, are there a number of manufacturers of wheels in the United States from which a sufficient supply could be obtained by the Southern Pacific Company?

A. Oh, yes. Yes, we could buy all of our wheels if we elected to do so, from outside concerns.

Q. I think you have testified that all wheels manufactured by the foundries are manufactured upon your written order to replenish the stock of wheels of your stores department?

A. That is correct.

The Court: May I ask a question there?

Do I understand it would be your testimony that you keep certain stock, we will say of wheels, on hand in the stores department and when that gets below a certain level or when it gets to a certain point where you deem it advisable to replenish it you then order wheels from the foundry, or do you? This may be a little compound. Can you answer that first? Is that your general testimony?

A. Well, like I stated in the beginning of each year we

[fol. 1079] give the wheel foundry an order to manufacture the cast iron wheels.

The Court: Is that based on what you needed the year before, somewhat?

A. There is no quantity specified on those orders.

The Court: Oh?

A. We know from their capacity and from the quantity that we use that their capacity of production will be equal or less than what we will need and if at any time during the year we build up an over supply, why, we ask the foundry to produce less, to reduce our production.

The Court: Other things being equal, you keep the foundry going full blast?

A. That is correct. It works every day.

The Court: And that is then done I suppose on your previous experience, that you use so many and you won't become overstocked in your own stores department?

A. Yes, for accurate consumption figures and we know how many we need for maintenance and how many we need for new car production and various uses.

The Court: Is the ordering on the foundry predicted in any way other than what you have just testified to, in other words, your own general knowledge of your specific demand; in other words, let us say that the demand came in for a great, large number of car wheels from some source, say Portland, Oregon, that you didn't know about and it came up in some unusual fashion, would you then order that made from the foundry at that time or would you still simply [fol. 1080] keep your stock replenished?

A. That would only present itself in the event of new car construction, unusual demand. For ordinary maintenance, why we know pretty well how that runs and if we faced the situation where the apparent supply that we had wasn't going to take care of needs we would ask the foundry to increase their production and they could accomplish it by putting on more force.

Mr. Wulff:

Q. You say, after the wheels are manufactured they are forwarded to other points outside of Sacramento for mounting?

A. Yes, sir.

Q. That means putting two wheels on one axle, is that correct?

A. Yes, that is correct.

Q. And for other refining or smoothing up, anything like that?

A. Anything like that that involves the boring out of the hub and fitting it to the axle.

Q. Now, that is true whether the wheel goes to the Southern Pacific Equipment Company on new manufacturing or whether it goes to maintenance or what?

A. That is correct.

Q. Now, does the wheel foundry also manufacture axles?

A. No, sir.

Q. What is the source of the axles?

A. Our axles are purchased.

[fol. 1081] Q. From outside manufacturers?

A. That is correct.

Mr. Wulff: I think that is all.

Mr. Colley: Just a few other questions.

Reexamination.

By Nathaniel S. Colley, Esq., counsel on behalf of Plaintiff:

Q. I am a little confused about your testimony of your ordering system in the wheel foundry. You stated I believe that you place your order on the first of the year, on the beginning of the year with the foundry, is that right? You place your order once a year on the foundry?

A. That is a yearly order.

Q. When you place that order you don't specify the number of wheels because you know in advance from prior experience that the wheel foundry can either equal your needs or produce somewhat less than your needs?

A. That is right.

Q. Well, how does it come about that you get an over supply of wheels?

A. Well, an over supply of wheels is generaly caused by reduction in car construction or reduction in the number of

wheels that are needed to replace worn-out ones, which is generally occasioned by seasonal requirements.

Q. So that you don't know in advance that the wheel foundry can only produce as many wheels as you can use or less than you can use?

[fol. 1082] A. Yes, we know that. That has been the pattern—I don't know, for twenty-five years that I know of, and that was always worked out that way.

Q. What I am trying to do, Mr. Helsel, is to resolve what I think is a patent conflict in your testimony. I understand on the one hand that you know at the beginning of the year that the wheel foundry at capacity will either produce as many wheels as you need or less than you need, isn't that right?

A. That is right.

Q. And then you also testify about an over-supply of wheels later on in the year.

A. Well, we only carry a few—we don't attempt to build up a supply, a year or two of wheels ahead. We only try to carry forty or sixty days all told on hand and while we may have plenty on hand now, at the beginning of the year, later on in the year we don't have enough at that time.

Q. Well, tell me this, does your foundry ever produce more wheels than you need?

A. They have produced more than we needed in the years past. That is the time that we were selling them to the Pacific Fruit Express.

Q. About when was that?

A. Oh, it has been—I can't recall exactly. I think around about four or five years ago.

Q. You mean, you haven't been able—or rather, you haven't been supplying the Pacific Fruit Express with [fol. 1083] wheels in about four or five years?

A. That is right.

Q. What about Southern Pacific of Mexico?

A. It has been about the same time.

Q. And you haven't supplied them any wheels in four or five years?

A. That is correct. We have had to buy them.

Q. What about your Northern Pacific? What was the other railroad you supplied?

A. Northwestern Pacific.

Q. Northwestern Pacific, have you also supplied them in four or five years?

A. We are supplying them right now.

Q. Oh, you are supplying them right now?

A. Yes.

Q. Then you know whether that is connected in any way with the Southern Pacific?

A. We have an interchange connection at Shellville, that is on our lines.

Q. Well, now, back to this accounting system: You automatically take all the wheels that the wheel foundry produces, don't you?

A. Yes, sir.

Q. In other words, you never have this situation that the wheel foundry is going to have to take a book loss because they produced more wheels than you are willing to take?

A. We control the production of the wheel foundry, we tell them how many wheels we want produced throughout the year.

Q. You control the production of the wheel foundry by [fol. 1084] telling them how many to produce?

A. Telling them how many to produce.

Q. Now, there again I am running into the same inability to understand fully your testimony. You say you control the production of the wheel foundry by telling them how many to produce and you also testify that you don't tell them how many to produce, you just tell them to produce wheels.

A. That is at the beginning of the year for simplifying the accounting we give them one order at the beginning of the year to produce the wheels, and it amounts to something like our yearly purchase order to cover what wheels we may desire throughout the year 1951 or whatever it is.

Q. And then later on you make the supplemental orders, is that what you mean?

A. No, sir. We keep track of how many we have on hand and how many we are using and whenever we get too many over our needs we ask them to reduce and when they don't get enough we ask them to increase.

Q. Then there is no way for the wheel foundry to suffer

a loss in its production activities because it is controlled entirely by the stores department?

A. I don't know of any loss that has ever been incurred on it. Like I previously stated we was always able to take all the wheels, generally speaking, that they could produce.

Q. I see. Now, on these axles do you handle the purchase and requisition of axles?

A. That is correct.

[fol. 1085] Q. Do you ever have occasion to have an axle last longer than wheels; for instance, the wheel is worn out and the axle is perfectly good?

A. I don't know, the time is limited on each one.

Q. Well, do you always mount these wheels on new axles?

A. No, sir, we mount them on second hand axles.

Q. And where do you get the second hand axles?

A. They are removed out of wheels that are scrapped because the rim is worn out or something like that.

Q. In other words, some of these wheels come in, say from El Paso, or Ogden where the wheel itself is no longer good because it is beyond its life or whatever you call it but the axle might be all right and you take the wheels off, you would mount the wheel on the axle, is that right?

A. That is correct.

Q. And when you get new wheels you attach your wheels to this axle that has just come in?

A. That is correct.

Q. And you affix this wheel and axle to the car they are repairing at assembly points?

A. Yes.

Q. And send them back out on cars?

A. Yes.

Mr. Colley: That is all.

Recross-examination.

By Horace B. Wulff, Esq., of counsel on behalf of the defendant:

Q. What is the percentage? Do you use more new axles [fol. 1086] than you use second hand, or do you know?

A. Oh, we use more—in the course of new car construc-

tion we use most new axles on that for the most part. On repair work the majority are second hand axles.

Mr. Wulff: I believe that is all.

Reexamination.

By Nathaniel S. Colley, Esq., counsel on behalf of Plaintiff:

Q. And when you say the majority of repair work are second-hand axles you mean repair these cars that originated at various points on the line which needed repairing?

A. I mean the cars which are sent into the shops that require wheels, that are shipped out.

Q. And these cars, while you don't know exactly which place they might have come from, they originated at any point on your line?

A. Well, they are delivered to us at interchange points and if they need a pair of wheels changed they are sent out to the first car repair shop.

Q. And Portland would be one of those interchange points, for instance?

A. That is right.

Mr. Colley: No further questions.

Mr. Wulff: That is all.

The Court: That is all?

Mr. Wulff: Two o'clock, your Honor?

The Court: Recess until 2:00 o'clock.

[fol. 1087] Afternoon Session

(Pursuant to the morning recess, the following additional proceedings were had and the following additional testimony was taken on Tuesday, December 11, 1951, at 2:00 o'clock in the afternoon.)

Mr. Wulff: There are a few more questions I would like to ask Mr. Helsel.

The Court: Very well. Will you step back, please?

Testimony of D. L. HELSEL, previously duly sworn, testified further as follows:

Recross-examination.

By Horace B. Wulff, Esq., of counsel on behalf of defendants:

Q. Mr. Helsel, when this shipment of scrap wheels or malleable scrap comes into Sacramento where does it go?

A. It is placed in storage. We have stock piles for it.

Q. "We," you mean——

A. (Interposing:) The stores department does, yes.

Q. And when it comes in is it billed to the stores department?

A. Yes, sir, it is billed to us.

Q. It remains in the stock piles until it is billed to you at the foundry?

A. That is right.

Q. Now, do you buy scrap wheels from outside sources?

A. Oh, yes, we buy them from any source we can get them. There is quite a shortage of scrap wheels and every opportunity we have to secure any, why we take advantage of it.

[fol. 1088]

Q. What sources do you buy them from?

A. Oh, we buy some from scrap dealers and other railroads and anybody that has them.

Q. And then you buy them from the P. F. E.?

A. Yes, we buy them from the P. F. E.

Q. To your knowledge is it necessary in the manufacture of new wheels to use scrap wheels?

A. Oh, it is essential. New wheels cannot be made satisfactorily unless you use an old one. An old wheel is necessary to make a new one.

Q. Can you explain that?

A. Well, the old wheel has a chemical content that has been built up through years that is uniform and it is standard that has been adopted by all car wheel manufacturers so that when a scrap wheel is used for making a new one, why they have a definite knowledge of its chemical content and know that it can be melted to produce a satisfactory wheel which will meet the common specifications as required

by all car wheel manufacturers. To make a new wheel out of new materials like pig iron and the other ingredients that might be needed, it would be a prohibitive process from the cost viewpoint as well as not being able to produce a satisfactory wheel.

Q. When you say a prohibitive figure you mean in comparison to costs of a wheel made from melted old wheels?

A. That is right, it would cost much more than a wheel [fol. 1089] made from melting from an old wheel.

Q. Now, do independent manufacturers also follow that practice?

A. Oh, yes. They all require—if you buy new wheels from an independent manufacturer you are obliged to ship them an old wheel for every new one you get.

Q. In other words, the source of the new wheel is likewise scrap from on old wheel?

A. That is right, they use the same procedure as we do in Sacramento in the manufacturing of wheels.

Mr. Wulff: I think that is all. Thank you very much.

Reexamination.

By Nathaniel S. Colley, Esq., counsel on behalf of Plaintiff:

Q. So then what you are saying is that the old wheels are not retired from use, they are just melted into a new form and sent back into operation, isn't that right?

A. They are retired from use, yes, sir, because they have reached their limit of wear. It wouldn't be safe to operate them in that condition and incidentally, they happen to be the best materials that is known to this date to make a new one out of.

Q. That is right, and you take the old wheel and you make new wheels from it and send it back into use again?

A. That is right, it is converted into a new wheel by melting down and remolding.

Mr. Colley: I see. That is all.

Mr. Wulff: That is all, thank you.

[fol. 1090] Mr. Colley: Call Mr. Aranda.

Testimony of ROQUE ARANDA, witness called in his own behalf, sworn.

Direct examination.

By Nathaniel S. Colley, Esq., counsel on behalf of Plaintiff:

Q. Would you state your name, please?
A. Roque Aranda.
Q. And Mr. Aranda, are you employed?
A. I beg your pardon?
Q. Are you working at this time? Do you have a job?
A. Yes, sir.
Q. By whom are you employed?
A. By the Southern Pacific Company.
Q. How long have you been employed by the Southern Pacific Company?
A. All in all for thirty years.
Q. And what are your duties in the Southern Pacific Company now?
A. At present I am a molder.
Q. And were you a molder at the Southern Pacific Company on or about the 12th of June, 1950?
A. Yes, sir.
Q. Would you explain to the Court what your duties consisted of?
A. My duties consist of making mold for a new wheel.
Q. Making molds for new wheels in the Southern Pacific Wheel Foundry, in Sacramento, California? Is that right?
A. Yes, sir.
[fol. 1091] Q. How long had you been doing that prior to June 12, 1950?
A. Since 1939.
Q. Since 1939?
A. Yes, sir.
Q. Would you describe to the Court just what you did on the job? You said you were molding wheels, but you see, the Court was originally a lawyer, he does not know much about molding wheels. Would you go into that?

Mr. Wulff: That is assuming something not in evidence.
The Court: That is a fair assumption.

A. Well, for our work there we have some iron boxes.

The Court: Some what?

A. Iron boxes.

The Court: Iron boxes?

A. Yes, sir, which consist of a drag, chill and cope. After we put in a pattern which is a form of a car wheel we make the first part of it which is the base of the wheel which goes in the drag. We fill that up with sand. We put a plate over it, turn that box on to the other side which is the cope. We put a core in there which is called a dish core, in other words, it is a runner which contains three holes for the iron to run into the mold. Then after that we fill that cope. That sand is pressed until it is hard enough to stay together. When we are through with that we open the box, draw the pattern from that box and we place another core in which is the center which forms the place where the axle goes into that wheel. After we give that finish to that mold we close that box and it will be ready for the iron. After that when we [fol. 1092] get through with that box we pour the iron into that mold. The final result is a wheel.

Q. Now, do you take the wheel out of this mold?

A. Yes, after we pour iron into it.

Q. And what do you do with the wheel after you take it out, after you have——

A. (Interposing:) We pick that wheel up with a crane and replace it onto a little truck and this little truck is a hand truck, and transport that wheel from the wheel floor to the part that they call pits, a hole like.

Q. Some sort of tempering pit, is that right?

A. That is what it is, that is exactly where they temper these wheels.

The Court: I don't think I understand the last part of the answer.

Would you read it, Mr. Reporter?

(Record read by the reporter.)

Mr. Colley:

Q. What happens to the wheel after it leaves the pit, if you know?

A. Well, so far as I know that wheel stays into those pits for five days. After that period of time they take that wheel onto a platform where they clean those wheels through sand blasting and after that they grind them and they are ready to be shipped out.

Q. Do you know how the wheel leaves the place from which it has been cleaned? It is sand blasted I think you [fol. 1093] said somewhere in the foundry?

A. Yes, sir.

Q. And you said it is ready to be shipped out. Do you know anything about how the wheel leaves the foundry?

A. As far as I have seen they use flat cars, box cars, and so on.

Q. Now, when you said flat cars and box cars do you mean regular sized freight cars or regular size, regular gauge railroad track cars?

A. Yes, sir.

Q. And do you know whether those tracks connect with the regular main line of the Southern Pacific Company?

A. Well——

Mr. Wulff (Interposing): If your Honor please, I object to this, unless he knows.

Mr. Colley: I am asking him, "Do you know?"

The Court: He asks if he knows.

Mr. Colley: The question is: Do you know?

Mr. Wulff: It doesn't make any difference where the track goes. It is where the car goes. He asks if the track is connected with the main line.

Mr. Colley: Well, we are going to establish a track and maybe we will establish a line from it.

The Court: I will overrule it if he knows. Do you know?

Mr. Colley: May I ask the question again?

The Court: Yes.

[fol. 1094] Mr. Colley:

Q. Do you know the track which goes down by the place where you sandblast the wheels connects at all with the

main line, say running between Sacramento and Reno for instance?

A. I don't know.

Q. You don't know. You don't know where that spur goes, is that right?

A. Right.

Q. You don't know whether it connects with any other train line, or not?

A. No, I don't.

Mr. Colley: That is all at this time.

Cross-examination.

By Horace B. Wulff, Esq., counsel on behalf of Defendant:

Q. Mr. Aranda, I believe you testified since 1939 you have been either a molder or a molder's helper, is that right?

A. Correct.

Q. And during that period all that you have done is just what you have described, the process of molding car wheels?

A. Correct.

Q. These car wheels are of different sizes are they not?

Q. And you have had no other duty other than what you have described in molding car wheels?

A. Correct.

Mr. Wulff: That is all.

Mr. Colley: That is all, Mr. Aranda.

The Court: That is all, Mr. Aranda.

Mr. Wulff:

Q. Do you ever see car wheels hauled away by a straddle [fol. 1095] truck? Do you understand what I mean by a straddle truck where they pick up things and carry them away?

A. Well, not away from the foundry I have not.

Mr. Wulff: You have not? That is all.

Mr. Colley: That is all.

The Court: That is all, Mr. Aranda.

Mr. Wulff: We have possession of it, let us put it that way.

Mr. Colley:

Q. All right, you have possession of it, that is right?

A. Yes, sir.

Q. Now, as a part of your duties in the stores department, as you refer to it, do you have anything to do with [fol. 1052] making of wheels for trains?

A. No, sir, we don't have anything to do with the making of them.

Q. All right, do you have anything to do with the supplying of trains with wheels?

A. We don't supply the trains, we issue them to the shops that process them and then they are used on the cars.

Q. Where do you get the wheels that you furnish to the shop?

A. Various sources.

Q. Would you name some of them?

A. Well, we purchase some and we make the rest of them in our wheel foundry in Sacramento.

Q. Could you give us any idea as to the proportion of the train wheels you purchase and what proportion you make in Sacramento?

A. Well, during 1950 approximately 16 per cent of the wheels were purchased that we used.

Q. That would mean about 84 per cent of all wheels used on your freight trains were made in the Sacramento Foundry?

A. Approximately so, yes, sir.

Mr. Wulff: Mr. Colley, I think the man testified that they supplied wheels to other railroads too.

Mr. Colley: I think he said they purchased railroad wheels.

The Court: Is that your testimony that you purchased them and then sold them to other railroads?

A. I have never been asked that question, your Honor. [fol. 1053] Mr. Colley: His testimony was that he purchased some of the wheels that they used, isn't that correct?

A. I think you asked me where we got the wheels.

Q. Yes, sir.

The Court: And without going into details, generally speaking about 16 per cent are purchased and 84 per cent are built?

A. That is true.

The Court: What did you call it?

A. They are manufactured.

The Court: Manufactured.

Mr. Colley:

Q. And that 84 per cent are manufactured in Sacramento?

A. Yes, sir.

Q. In fact, the Sacramento Foundry is the only wheel manufacturing foundry operated by the Southern Pacific Company, isn't that right?

A. That is correct.

Q. Now, do you have any idea as to what percentage of your cars operate in intra-state commerce, that is, don't go outside of California? For instance, on a run from here to Woodland, or a run from here to Roseville or Truckee?

A. I couldn't answer that.

Q. You have no idea about that?

A. No, sir.

Q. Is there anything in your duties as chief clerk in the stores department which would indicate what percentage is used in that manner by knowing where you send the stuff from the stores department?

[fol. 1054] A. Would you repeat that again, please?

Q. Could you give us any idea on the question of what percentage of your supplies go outside of California?

A. No, sir, I cannot.

Q. Well, when you have stores to supply you just supply to the train, here in Sacramento?

A. We issue all of our supplies on requisitions, which is a request by the using department of the material.

Q. And that using department is always here that makes the request?

A. Oh, no, we get them from all over, all over the system of the stores that we supply.

Q. What I was asking, could you give us any idea as to what percentage of those requests come from points outside of California?

A. We maintain no breakdown of the quantity of material.

Q. I know you have no breakdown but surely you would have some idea as to whether or not half of the stuff you send out goes outside the state or whether very little goes outside the state or whether all of it goes outside of the state, just from general handling of the stuff fifteen years, wouldn't you?

A. Well, for example, the multitude of it, we probably handle 60 or 70,000 requisitions a month. Of course, I don't see all of those. We get about 600 carloads of material in a month and to answer that or give you any close accurate or approximate figure, why it would require [fol. 1055] quite a bit of research to dig up the information.

Q. Well, have you got any idea as to how many stores or supply points or other places where requisitions come from, that the company has, are within the State of California?

A. Yes, sir, we have about eight, nine—oh, maybe twenty points in the State of California that we supply.

Q. Now, could you give me any idea as to how many points you supply in all, counting everywhere?

A. Well, the out-of-state stores in El Paso and Los Angeles are the largest ones, Brooklyn and Ogden and Sparks, Nevada, are on the outside.

Mr. Wulff: Brooklyn is not the Brooklyn in New York; that is Brooklyn and Portland.

Mr. Colley: The man is under oath. Let us let him testify as to what he means. It might be New York.

Mr. Wulff: I thought I would facilitate it.

The Court: You do mean Portland?

A. Yes, sir. Portland is what I mean. Brooklyn is a suburb of Portland.

Mr. Colley: Whenever you feel it is necessary, you tell me what state you are talking about. Would you do so? Whenever you say "Brooklyn", for instance, say the state.

A. Yes.

Q. When you say, "Chicago," in California, see, say "I don't mean Chicago, Illinois, I mean Chicago, California."

A. That is right.

[fol. 1056] Q. So that you do have these points outside of California that you supply as well. Now, let us go back to the wheels a minute, Mr. Helsel. Tell us what the operation is, of getting these wheels and dispatching them as to where you want them to go, what routine do you go through when you get ready to get wheels to supply?

A. Well, we make an order on the foundry to produce the wheels and after——

Q. (Interposing) Now, when you say "on the foundry", you mean on the foundry in Sacramento, is that right?

A. Yes, sir. If the production is such that it won't get the requirements why then we have to originate a purchase requisition to buy them. We get them from the two sources.

Q. Is there any particular place you buy them from when the foundry can't produce them or hasn't got enough to supply?

A. I get most of them from the Griffin Wheel Company in Los Angeles.

Q. When you say most of them, you mean you get most of those you have to buy?

A. That is right, yes, sir.

Q. But when it comes to most of those you use on your line, you get them from your Sacramento Shop?

A. That is correct.

Q. All right, you made a requisition on the Sacramento shop for a certain number of wheels, is that right?

A. We make a yearly order on them to produce the [fol. 1057] wheels. We don't specify any amount.

Q. What? You just give them an order and tell them to produce wheels?

A. We give them an order to make up the various size wheels which we know that their production will be equal

or less than the requirements. That is a system of accounting that we have. It is not necessary to show the quantity that is required.

Q. Now, when you requisition those wheels don't you tell them how many of those you want? You just make an order on the foundry for wheels?

A. That is right.

Q. Do you send the foundry any money for these wheels?

A. We don't pay money inter-department.

Mr. Wulff: I object to that, I am not clear what you mean by "we."

A. Sir?

Mr. Colley: Just a minute, this is not a proper objection. If the man says "we", on cross examination he may object.

Mr. Wulff: I move to strike it out.

The Court: What was that?

Mr. Wulff: I object to it on the ground he says, "we." Now, who is "we"? It doesn't make any sense until we know who "we" is.

Mr. Colley: I submit that it is not a ground for an objection.

Mr. Wulff: It is ambiguous and uncertain. It might [fol. 1058] be objectionable. He might mean his department.

Mr. Colley: The fact that the testimony of a witness is not satisfactory is not the grounds for objection. That is the function of cross examination to clarify. If the testimony is admissible then there is no objection to it on the ground it is uncertain.

The Court: That is probably true. Do you withdraw your objection?

Mr. Wulff: No. I think I want a ruling on it, certainly. When he says "we" I object to that, it is immaterial and incompetent because it doesn't mean anything.

The Court: Incidentally, from a technical grounds the question has got to carry with it something else before the Court would have something constructive from the answer.

Mr. Colley: I don't want to quibble.

The Court: I don't see the importance of it. I think I probably understand what he means. I think the Court does. However, I will sustain it just for the matter of the record. When you say "we", whom do you mean?

A. The Stores Department.

The Court: That is what I understood.

Mr. Colley:

Q. And you are Chief Clerk in that department?

A. Yes, sir.

Q. And you would know whether the Stores Department paid any money for those wheels when they made the order?

The Court: He testified a minute ago that they didn't [fol. 1059] use any money in that transaction.

Mr. Colley: It is an accounting system, isn't it?

A: Yes.

The Court: Intradepartmental—intra-company, interdepartmental affairs?

A. That is right.

Mr. Colley:

Q. And you don't order any special number of wheels you just tell them to produce wheels?

A. That is correct. However, we regulate production by asking them to reduce or increase the number of stores throughout the year. That is regulated according to the demands.

Q. So that the Stores Department regulates the number of wheels produced in the foundry?

A. That is correct.

Q. And the Stores Department bases its regulation upon the number of wheels needed for the trains of the Southern Pacific Company?

A. That is correct. Not trains and for car building and any other sources that we—or any people that we have to supply.

Q. Now, you put your requisition in at the beginning

of the year for wheels. Now, when are these wheels delivered to the Stores Department?

A. They are delivered throughout the year, wheels are coming out most every day.

Q. Do you take delivery every day?

A. Yes, sir.

[fol. 1060] Q. And how do you actually, physically, give the wheels from the foundry to the stores department?

A. Well, they are moved by various means, by straddle trucks and by inter-shop cars.

Q. When you say by "inter-shop cars", you mean by flat cars, railroad cars?

A. Yes, flat cars that are just used for inter-shop movement.

Q. Railroad tracks run up to the foundry, isn't that right?

A. Correct.

Q. In fact, you have a railroad track running right alongside of the wheel foundry, don't you?

A. That is correct.

Q. Now, do you ever have occasion to have a flat car rolled up to the side of your foundry and take delivery of wheels and send them to any place other than right in Sacramento yards for the Stores Department?

A. Yes, we supply wheels for several wheel mounting points.

Q. And where are some of those wheel mounting points?

A. Well, they are mounted at Dunsmuir, we are mounting at Portland, Oregon, mounting them in Ogden.

Q. I see.

A. That is the main ones on the northern district.

Q. I see.

A. We also send them to Los Angeles and El Paso.

Q. Now, that delivery is by means of a spur track which connects the wheel foundry to the main lines of the Southern Pacific Company, isn't that right?

[fol. 1061] A. That is correct.

Q. Now, the wheels that you keep in the S. P. Shops for building are out there; tell us what happens to them and how they are delivered to the car shop?

A. Well, right at the time those wheels are being sent

to outside wheel mounting points and axles applied and returned to Sacramento.

Q. Oh, you mean that some of those, sometimes they are sent to, for instance, Portland on the flat car just as wheels?

A. Yes, sir.

Q. And when they get to Portland the axles are put on?

A. Yes, sir.

Q. And they are sent back to Sacramento to the car shop?

Mr. Wulff: To the stores.

A. They are sent back to the Stores Department and then we issue them to the car shops for their car work.

Mr. Colley:

Q. And Portland is just one of the places where the axles are put in and from where they are returned to you?

A. That is right, and Los Angeles helps out some.

Q. And Los Angeles helps out some and Ogden?

A. And Ogden.

Q. Ogden, Utah?

A. Yes.

Q. And Dunsmuir?

A. Yes.

Q. All right. Now, when the wheel and axle comes back from this point, where the wheel and axle has been more or less united or mounted you send the wheels and ~~axle~~ [fol. 1062] from the stores department into the car shop?

A. That is correct.

Q. And do you know what happens to them there?

A. Well, they use them for car building for repairs to cars that need a new pair of wheels, and various purposes.

Q. Do you have any idea where these cars have come from which might need a new pair of wheels?

A. Why, we don't see the bill, they come in by trains and then they put the wheels in, on trains.

Q. At any rate, they come from service?

A. They come in from wherever they originate from, I don't know. They are cars that are interchanged and come in through our gateways.

Q. What I am trying to find out—I assume it would be safe to say you don't know where the cars originate, but they come from all points into Sacramento?

A. Not from "all points", I wouldn't know.

Q. Would you say that sometimes they come from as far as Reno?

A. Yes, sir.

Q. They do?

A. Yes, sir.

Q. And they would come into the car shop here and some of these wheels that have been made here, sent to Portland and back to Sacramento, they might be applied on one of those cars from Reno?

A. Yes.

Q. And then that car would be sent back into general service?

[fol. 1063] A. Correct.

Q. Do you have any idea, with the requisitioning of materials, the supplies from which the wheels are made?

A. Yes, we provide all the materials for that, or we acquire the materials.

Q. Would you know what goes to make up a wheel, what those wheels are made of?

A. Well, the majority of it is the old wheel that is taken out when it is scrap, and then there is various alloys added.

Q. Do you do anything else with old wheels except make new wheels out of them?

A. That is all, yes. That is all we use them for.

Q. That is all you use them for so that whenever old wheels go back, or rather, go bad, no matter whether it is in El Paso, Ogden, Reno, Portland, Los Angeles, or Dunsmuir, those old wheels are funneled back into Sacramento into the wheel foundry, is that right?

A. In the wheel mounting points, yes, sir.

Q. From the wheel mounting points and those are in some of the places—anyway Portland, Oregon; Dunsmuir, California, Los Angeles, California——

A. El Paso.

Q. El Paso, Texas?

A. Yes, sir.

Q. And Ogden, Utah?

A. Yes, sir.

Q. Those used wheels from the wheel mounting points are funneled back into Sacramento to be remolded into [fol. 1064] new wheels, is that correct?

A. That is right.

Q. And then the cycle starts all over again, and then the new wheels go out?

A. That is right.

Q. Do you know of any way of repairing a wheel when it commences to go bad other than remolding it into a new wheel?

A. Repeat that, please?

Q. Do you know of any way of repairing a wheel? You have any operation for repairing wheels when for instance the rim lip ceases to be as long as it ought to be; when it commences to wear? Is there anything you can do with that wheel except to mold it into a new wheel?

A. On steel wheels we put on a flange.

Q. But the iron wheels used on freight trains?

Mr. Wulff: I object. I object to that as assuming something not in evidence.

The Court: Sustained.

Mr. Colley: You are correct.

Q. What kind of wheels do you use in freight trains?

A. Use steel and cast iron.

Q. And about what percentage of the wheels used are steel?

A. I couldn't tell you that, I don't know.

Q. Do you order some steel and some cast iron?

A. Yes, sir.

Q. And where do you order these steel wheels?

A. You mean, where they are made?

Q. Yes.

A. They come from the eastern steel mills, Pittsburgh [fol. 1065] area.

Q. You told us a moment ago that you make 84 per cent of these wheels, of the cast iron wheels and you have no idea how many steel wheels you order in the course of a year?

A. I couldn't give you that from memory, no.

Q. Let us stick to the steel wheel then. Pardon me, let us stick to the cast iron wheels or the iron wheels.

A. Yes, sir?

Q. When that commences to get defective because of use or because it wears out do you have any means of turning the lips down on them?

A. No, sir, we don't turn the lips down on them.

Q. They bring them back into Sacramento and melt them down and make new wheels?

A. That is right.

Q. Before I interrupted you a moment ago you were about to tell me what goes into the makeup of a wheel and you told me that the primary ingredient was the old wheel itself melted down or molded into a new wheel; now, is there some other thing that you use?

A. Yes, sir. There is various alloys that are added.

Q. Would you name some of these alloys that are added, first of all, if you know?

Mr. Wulff: We haven't had anything that he does know.

A. My, no, I don't know.

Mr. Colley:

Q. But you supply these alloys, do you?

[fol. 1066] A. That is correct.

Q. Where do you get these alloys?

A. We buy them from the various suppliers.

Q. Do you buy them from eastern suppliers?

A. Our coke comes from the east but these other ingredients I think they come from—I am not sure but I think they come from San Francisco jobbers.

The Court: What did you say again comes from the east?

A. The coke.

The Court: The coke?

A. Yes, sir, it is used for melting the metal.

The Court: You mean, coke that you burn?

A. Yes, sir, same thing.

The Court: Is that an ingredient of the wheel?

Mr. Colley: Source of energy, your Honor.

The Court: Or is it the source of the fire that you use?

A. I am afraid you would have to get Mr. Davidson to answer that—whether any of the coke goes in the wheel or not I wouldn't say. I rather think it does. I think they control the carbon content with that but he is well versed on that.

Mr. Colley:

Q. In any event you get the coke outside of California, don't you?

A. Yes, sir.

Q. It is eastern coke and by that you mean it comes from Pennsylvania or the northern fields?

Mr. Wulff: If the Court please, it is immaterial whether the various supplies and materials that go into the wheel [fol. 1067] come from some other place because we are not dealing with commerce as commerce is generally dealt with. We are dealing with commerce as synonymous with transportation. It deals with transportation on the road and not whether the wheel itself, the pig iron, or the scrap iron came from one state to the other or whether the alloys came from one state to the other. In other words, the courts have placed an entirely different construction upon it.

The Court: Is it your position we can't go behind the wheel, as a wheel then?

Mr. Wulff: My contention is that we are dealing with manufacturing here that has no connection with transportation. In other words, this is not alluding to any transportation until it is up on the car. In other words, if you are manufacturing a wheel in interstate commerce iron is iron or the mining of coal or coke that goes into the preparation of it is immaterial. In other words, everything that is interstate commerce has a certain construction placed upon it. We are dealing with movement of the product and that is the way the courts have construed it.

Mr. Colley: My position, your Honor, is that in order to get it into the record, the picture of this wheel which we have already established is that it goes into interstate commerce and we would have to find out whether or not in

the making of the wheel itself that operation affects distinctly and substantially interstate commerce. Now, prior [fol. 1068] to the 1939 amendment you certainly would have been restricted to a very great extent. They would want to know whether or not in the movement of it the employee was engaged in certain transportation, and that resulted in a great amount of confusion because it was hard to tell whether a man was engaged in interstate transportation. I was going to show that they use enough coke to turn out the wheels so that it would affect interstate transportation. At most it would be evidence of little weight, but it doesn't mean it is not admissible. It is certainly not prejudicial to the defendant. I think his objection goes to the weight of it.

The Court: I think it would unduly enlarge the scope of this hearing if we go back to the situs of every portion of the wheel, where they came from originally. As you say, it doesn't have a great deal of weight until you discover what is happening as far as the wheel itself is concerned. However, it seems to the Court that this is a matter which is really going into the question of law. I think that for that purpose I will permit it.

Mr. Colley: I won't dwell upon it, your Honor.

The Court: I will permit it and overrule the objection with the understanding that if the Court does find that the act as now construed only goes to the question of transportation then this may be stricken out.

Mr. Colley: All right, that is satisfactory.

Q. Just to leave that at this point your testimony is that [fol. 1069] it is eastern coke that is used to heat the foundries to melt the wheels down?

Mr. Wulff: He does not know about that.

The Court: I think he said he was not sure of that.

Mr. Wulff: Whether it was used for heat or whether it was used to control the carbon content.

Mr. Colley:

Q. But in any event it is coke from the eastern areas?
A. That is correct.

Mr. Colley: All right, you may cross examine.

Cross-examination.

By Horace B. Wulff, Esq., of counsel on behalf of defendant:

Q. How long have you maintained in Sacramento a wheel foundry, if you have any knowledge of it?

A. It is forty or fifty years I imagine.

Q. I understood your testimony to be that the wheel foundry manufactures these wheels solely from order from your department?

A. That is correct.

Q. And after the wheel is manufactured it is delivered to your department, is that correct?

A. Yes, sir.

Q. And where is it placed?

A. Sir?

Q. Is it placed in stock?

A. Yes, sir, it is placed in stock.

Q. Do you ever note wheels for any particular freight car?

A. No, sir.

Q. Or any particular railroad car?

A. No, sir.

[fol. 1070] Q. In other words, does the foundry have any idea as to where the wheels they manufacture are to be used?

A. No, sir, they wouldn't.

Q. Do you have any idea where the wheels are going to be used when you order them?

A. No, sir.

Q. And when they are delivered from the foundry?

A. We don't know what they are to be applied on.

Q. Isn't it a fact that when the wheels are manufactured you pick them up at the foundry—when I say "you" I mean the stores department, and place them in your own storage area?

A. That is correct.

Q. Are wheels shipped directly from the foundry to points for mounting?

A. That is correct, yes, sir.

Q. But only for mounting purposes?

A. That is right.

Q. And they are returned back to the stores department?

A. That is correct.

Q. Now, do you use any other kind of scrap iron in the manufacture of wheels other than wheels?

A. There is a certain amount of other metals such as malleable used, malleable scrap—small percentage.

Q. Where do you acquire that?

A. Well, that is general accumulation that we accumulate in our scrap docks where the scrap is sorted.

Q. Do you ever buy any malleable scrap on the outside market?

[fol. 1071] A. I don't recall of ever having done it, no.

Q. Is that kind of scrap available in the open market?

Mr. Colley: I am going to object to the question as to whether it is available or not. He has testified he does not know of them ever using any.

The Court: Sustained.

Mr. Wulff: Q. Are all these wheels and malleable scrap accumulated in the stores department—accumulated by the stores department, I mean?

A. Yes, sir. We have charge of all that material.

Q. I believe you also have testified that you purchased—when I say you, the stores department purchased all the necessary alloys?

A. That is correct.

Q. And all the other necessary materials?

A. Yes.

Q. That are used in the wheels in the stores department?

A. Yes, sir.

Q. And you furnish those upon requisition from the foundry?

A. That is right.

Q. They order those from you?

A. That is correct.

Q. Now, have you any figures there as to the number of wheels that the stores department manufactured upon your orders for the year 1950?

A. Yes, during 1950 there was 67,734 wheels produced in the foundry.

[fol. 1072] Q. And delivered to the stores department?

A. And delivered to the stores department, yes, sir.

Q. Have you figures for 1951 to the first of the month?

A. There was 65,216 for January 1, 1951 until the first of December.

Mr. Colley: Of course, your Honor, this accident occurred in 1950 and what they did in 1951 is not at all material.

Mr. Wulff: Only showing the size of the operation.

Mr. Colley: What the size of the operation is in 1951 hasn't got anything to do with what it might have been prior to the accident.

The Court: I think it may be. It is probably preliminary, I will overrule it.

Mr. Wulff: Q. Now, have you any data to show where the outlay of these wheels was, where they were sent during 1950?

A. Well, during 1950 there was 9,266 that were used for building new cars and there was 926 of them furnished the Northwestern Pacific Railroad, and there were 57,526 that were used for repairing cars, that is Southern Pacific owned cars and any other cars that might need a pair of wheels, and then there were 16 that were sold to the Pacific Coast Aggregates Company.

Q. Now, can you give those figures for 1951?

A. For 1951 there was 27,694 that were used for new car construction, 754 of them were sold to the Northwestern Pacific. Ten of them were sold to the Pacific Coast Aggre- [fol. 1073] gates, and then there were 36,758 that were used for maintenance purposes on existing cars.

Q. Now, you spoke about the wheels used for the maintenance of cars of the Southern Pacific Company and other cars; now, do you mean by that cars of other railroad companies?

A. Yes, sir, that would include any car owned by other properties that happened to need a pair of wheels when they were on our line.

Q. What is the procedure there? Doesn't the Southern Pacific Company or you, in the stores department, sell these wheels to these various other railroad companies?

A. Well, a foreign line car that is on our property and

Mr. Colley: Call Mr. Davidson.

The Clerk: What is your name, Sir?

Witness: John R. Davidson.

Testimony of John R. Davidson, witness called on behalf of Plaintiff herein, sworn.

Direct examination.

By Nathaniel S. Colley, Esq., counsel on behalf of Plaintiff:

Q. Would you state your name, please?

A. John R. Davidson.

Q. And where do you live, Mr. Davidson?

A. Sacramento, California.

Q. And by whom are you employed?

A. Southern Pacific Company.

Q. In what capacity?

A. Supervisor of foundry operations.

Q. Do you have more than one kind of foundry that you supervise?

A. Yes, the brass foundry and the wheel foundry and the iron foundry.

Q. Now, the brass foundry, iron foundry and wheel foundry——

A. That is correct.

Q. Each of those three foundries is located in Sacramento?

[fol. 1096] A. That is correct.

Q. And are they located close together?

A. The wheel and iron foundry are in the same building. The brass foundry is about a quarter of a mile away, but they are all inside the S. P. Shops.

Q. When you say "inside the S. P. Shops", is that an area which includes the S. P. Depot in Sacramento, California, where trains come in and discharge passengers?

A. The shops are north of the depot.

Q. But separated by the depot—or separating the depot from the shops is nothing except railroad tracks?

A. Railroad, that is correct.

Q. And they are company property?

A. That is correct.

Q. Now, you have supervised the wheel foundry as well I think you said?

A. That is correct.

Q. And you supervise the iron foundry?

A. My supervision accomplishes metallurgical control, in other words, the seeing that we get the correct compositions of various metals that are used and the correct amounts of materials, and that we meet both the Government and the S. P. specifications.

Q. I take it then that you are thoroughly familiar with the operations in a wheel foundry?

A. From the metallurgical standpoint I am.

[fol. 1097] Q. I see. Well, let me get a few questions about the iron foundry. What do you do in an iron foundry generally?

A. Well, the iron foundry, we make locomotive castings and miscellaneous castings for the car, for our passenger cars and for shop machinery. Also we make brake shoes.

Q. Now, in any of your foundries do you melt down old wheels of railroad cars?

A. In a wheel foundry we melt about 97 per cent old wheels.

Q. You melt these in the wheel foundry?

A. In the wheel foundry.

Q. Now, where do you get these wheels that you melt down in the wheel foundry?

A. We get them from the stores department and make part of it, of course I don't know where they get them from. All I am concerned with is when they are delivered to the foundry to see they have the correct compositions and our metal analyzes correctly.

Q. Now, do you know how those wheels get to the wheel foundry?

A. Those wheels come to us on flat cars.

Q. And does the car come over a regular sized, regular gauge railroad track?

A. Regular, standard gauge, that is all we have in the shops.

Q. Is that track over which the flat car comes connected with the other railroad tracks in the yard?

A. It is. It is the only way we can get the car in.

Q. In other words, the cars might come from any point? [fol. 1098] A. Any point, we don't know where they come from.

Q. It might come from Ogden, Reno, or any other point?

A. We don't know that.

Q. You don't know, but in other words, it is connected with the tracks leading to those places, anyway?

A. That is correct.

Q. And the car comes right by the foundries?

A. That is correct, to the foundries.

Q. All right, to the foundries, and you have a crane or something?

A. With a crane it is unloaded then and some of them is unloaded with a wheel roller.

Q. You unload some with a wheel roller and some with a crane?

A. Yes.

Q. And then you melt them down?

A. That is correct.

Q. And then you have a process where you mold new wheels?

A. That is correct.

Q. And they go out by flat car?

A. No, only part are hauled out by flat car. The rest are hauled by straddle truck. We have a straddle truck and every morning it hauls wheels away.

Q. Could you tell us what a straddle carrier is?

A. Well, have you seen lumber carriers?

Q. You mean something that has a jack that raises up lumber?

A. Yes, this is a straddle truck and those things carry twelve big boxes and then some of them are taken to the shop.

[fol. 1099] Q. Do you do some axle work in Sacramento?

A. We do only wheel work and axle work is done at outside points.

Q. Do you know which outside points?

A. That really doesn't concern me but as Mr. Helsel says, they are sent to Ogden——

Mr. Wulff (Interposing): I object, unless he knows of it. It is outside of his work.

Mr. Colley: It might be outside of his work but he is my witness and if he knows where they go that is testimony we are entitled to have.

The Court: Based upon your knowledge do you know about this? In other words, you are not allowed to just speculate or tell us what you think, where you think they go.

A. I know they are being sent to Ogden and Brooklyn, at Portland, to do that work.

Mr. Colley: That is all we ask.

The Witness: But I am not connected in any way with that part of the work.

The Court: What we want to know is if you know it?

A. Yes, I know it.

The Court: If you know it, that is all right.

A. Yes.

Mr. Colley:

Q. On or about June, 1950, were you taking some of these iron wheels over to the car shop to be shipped by straddle truck?

A. Well, that is a little way back but I am under the im-
[fol. 1100] pression we were.

Q. In other words, that is your best recollection of it?

A. That is correct.

Q. Realizing full well that you don't know exactly what happened a year and a half ago?

A. That is correct.

Q. When the wheel gets ready to go out of the wheel foundry, I think you said that some go by straddle truck and some go by——

A. (Interposing): Flat car, box car.

Q. Flat car. But now they don't send any over to the Sacramento car shop to be bored and fitted with axles, and would you say they all go out with flat cars?

A. No, because the store now carries loose wheels and they go over to the store department to be used for stock and inventory.

Q. And only those heading for outside points are loaded in a flat car——

Mr. Wulff (Interposing): Just a minute, I object to it as leading and suggestive.

Mr. Colley: I am clarifying what he had said.

Mr. Wulff: It is still leading.

Mr. Colley: I haven't finished the question.

The Court: The last part of it is rather leading, Counsel. I think you can reframe it.

Mr. Colley:

Q. Well, you still load some wheels on flat cars, is that [fol. 1101] right?

A. That is correct.

Q. And do you have any knowledge as to where those wheels are headed that you load on flat cars?

A. No, I don't. I have no idea.

Q. Well, you do know, however, that they are headed for outside points to be fitted with axles?

A. We know that, I don't know where.

Q. You don't know which of the outside points?

A. No, I don't know what outside points.

Q. The outside points might be Dunsmuir, Ogden, or Los Angeles?

Mr. Wulff: He has testified he didn't know.

The Court: I will sustain it. I think it is a matter for the Court to decide as to actually what he means by outside points and how much rate it is to be entitled to. Does that mean the railroad operates outside points?

A. Yes, it does. It means outside of Sacramento.

The Court: Just outside the City of Sacramento?

A. To any points outside of Sacramento would be "outside points."

The Court: Sacramento city?

A. Sacramento Shops, yes.

The Court: Sacramento Shops?

A. Yes.

The Court: Outside points means anything that is outside the shops does it?

[fol. 1102] A. That is correct.

Mr. Colley: At the present time do you have any idea what percentage of the wheels you make and load on the flat cars are shipped and what percentage are taken by straddle truck?

A. No, I don't.

Q. Well, do you see flat cars loaded at the wheel foundry?

A. Oh, yes.

Q. On occasion?

A. Yes.

Q. And would you say every week, for instance some would go out on a flat car?

A. I would say every week, but as I said before my work is metallurgical and I don't have anything to do with the shipments. The stores handle all the shipping.

Q. You made that clear, but I am asking now the things you observed around the shop. You have to go to the wheel foundry, don't you?

A. Yes, I am all over practically every day.

Q. And in going and coming to the wheel foundry I want to know if you see flat cars parked around the wheel foundry?

A. I never paid any attention on the east side—and I don't go always around the east side because I am not concerned with what goes out of the foundry.

The Court: I want to know whether you have seen recently flat cars and wheels being moved out?

A. Oh, yes, I have noticed them occasionally.

Mr. Colley:

Q. You have noticed them occasionally. And you noticed [fol. 1103] them occasionally about June 12, 1950?

A. I couldn't answer as to that, that is a little too far back.

Mr. Wulff: If your Honor please, he has stated he is employed in a certain capacity and we had a man in who testified that they are shipped out.

The Court: He has a right to elicit from this man what he knows no matter what department he is in.

Mr. Colley: You insisted that he be my witness.

Mr. Wulff: All right, you have him.

Mr. Colley: All right, he is mine and I am glad of him. I am asking you about your operations, I am not asking you about your duties as supervisor in the car foundry. I am asking you what you have seen there and about the car shops. And you have seen wheels being loaded on occasion?

A. Yes, more or less.

Q. And that isn't something that you have observed in the last few weeks?

A. Oh, no.

Q. And there is nothing unusual in this than you have seen in the last few months?

A. That is right.

Q. Is it the same sort of thing you have observed, since you have been working there?

A. I would say it is.

Q. How long have you been working there?

[fol. 1104] A. Well, I have been connected with the wheel foundry since 1933.

Mr. Colley: You may cross examine.

Cross-examination.

By Horace B. Wulff, Esq., of counsel on behalf of defendant:

Q. Now, Mr. Davidson, you testify that you were superintendent of the foundry operation and in charge of the metallurgy portion thereof?

A. That is correct.

Q. Now, do you know whether it is necessary for you to make applications to the National Production Authority as to the quantity of scrap you may use in your operation?

A. Well, right now, the control does not exist on the scrap but we have to report the amount of our alloys that we use, that are consumed each month to the Government and——

Mr. Colley: I am going to object to this as being beyond the scope of the direct examination and on the further ground it is incompetent, irrelevant and immaterial as to whether or not he has to report to the Production Authority.

The Court: That is preliminary.

Mr. Wulff: Of course, if he is the man in charge of the operation and when you spoke of the operation it was fine.

Mr. Colley: He says he is a metallurgical man.

Mr. Wulff: He has got a lot of spaces between his remarks I can fill in.

The Court: It is not proper cross but I will overrule it [fol. 1105] temporarily. I will assume it is preliminary.

Mr. Wulff: In other words, are you subject to the same requirements that any other industry is subject to?

A. Absolutely.

Mr. Colley: I am going to object to that, your Honor, as calling for something beyond the scope of this man's knowledge.

Mr. Wulff: Oh, no.

The Court: I think it is. That is a very general statement. I will sustain it.

Mr. Colley: I move to strike it out from the record, the answer from the record.

The Court: It may go out.

Mr. Wulff:

Q. Are you familiar with the requirements of the National Production Authority relative to the wheel foundry of the Southern Pacific Company?

A. Yes, sir.

Q. Are you familiar with the requirements of the National Production Authority relative to the requirements of the independent foundries manufacturing wheels?

A. Well, they would be the same—we are under the same regulations as they are. They have to report to the Government their critical materials just the same as we do and we are classed as an industry along with them and we report as an industry.

Q. Now, what is the material you use to melt and in order [fol. 1106] to produce wheels?

A. Right now, we are using about 97 per cent scrap wheels and about 3 per cent malleable iron.

Q. Why do you use malleable iron?

A. Because of shortage of scrap wheels. We prefer to use 100 per cent scrap wheels.

Q. Are you familiar with what other manufacturers use as their source of materials for wheels?

Mr. Colley: I object to that, what other manufacturers use.

Mr. Wulff: I want to show that wheels are not cast from old wheels because for instance this wheel is worn out but because that is the best available material we have for that purpose. I have a right to explain what the wheel is made of.

The Court: That goes to the same objection that was raised this morning which I would say goes very largely to the crux of this entire matter, that is whether or not the action is only in reference to one feature or the other; that is, as I understand Mr. Colley's position it includes transportation as well as manufacture. So that ruling on that objection is almost equivalent to the ruling on the entire matter.

Mr. Wulff: I think it is a little broader than that in this case, that the case is two-fold, in that it involves repairing of equipment which is used in interstate commerce and locally. If this making new wheels could be classified as a repair why then it would be interstate commerce, but if it is a new construction then it is not interstate commerce, [fol. 1107] and what I am trying to show is that this isn't the repair of a wheel. I am trying to show that if his argument is that wheels could be repaired so that they recast them and it constitutes a repair, that is error. That is not repair. In other words, as Mr. Halsel has testified the old wheel is thrown away as a usable wheel, it goes into the scrap pile and the scrap pile is salvaged, some malleable material is used for this purpose and the wheels are used exclusively for the melting down together into the new wheel. It is entirely a manufacturing feature. Now, that field I think I am entitled to explore and negative any contention he may raise along those lines.

Mr. Colley: Your Honor, may I be heard on that?

Mr. Wulff: Certainly.

The Court: Proceed, Mr. Colley.

Mr. Colley: In the first place, the fact that other manufacturers might use old wheels hasn't got anything to do with this case at all and the next point is that this witness

is not competent to testify about what other manufacturers might do if he is testifying from his belief or hearsay or otherwise there is certainly no foundation laid to ask this man, to ask this witness as to what other manufacturers might do. If he is going to lay a foundation and wants to go into that and the Court says it is all right, why then all right, but he has laid no foundation to ask this witness questions as to what other manufacturers might do.

[fol. 1108] Mr. Wulff: I might lay a foundation.

The Court: There is also some question as to whether he is testifying as a metallurgical expert because that is what these questions will contemplate.

Mr. Wulff: He is superintendent in charge of metallurgy. That was proved. This is all cross examination.

The Court: If Counsel wishes to examine him in voir dire with regard to his expertness you might do that. I think, Mr. Colley, the subject is sufficiently open to allow Mr. Wulff to go into that feature.

Mr. Colley: As to what other manufacturers do?

The Court: If he knows. He can't speculate. It depends on his answers as to whether he knows or not.

Mr. Colley: Withdraw the objection.

Mr. Wulff: Withdraw the question.

Q. Mr. Davidson, you are the one that regulates in the wheel foundry the materials that go into the molten iron?

A. That is correct.

Q. And I think you have testified on direct examination that 97 per cent——

A. (Interposing) Correct.

Q. (Continuing)—is car wheels. Now, can you tell us why you use car wheels?

A. Yes, for two reasons: One is that a wheel has the same chemical composition as the new wheel we desire to produce and another reason is that by that car wheel being [fol. 1109] used we use scrap at the market price that anybody would buy that car wheel, whereas if we had to put in some pig iron we would have to put in more money and it would make our picture more expensive than say that of the Griffin Wheel Company of Los Angeles; and for that reason we want to be sure we don't have to use a lot of ex

pensive alloy. We prefer to use 100 per cent scrap, and I might further add so do all the other foundries.

The Court: Do you know that?

A. For a fact, Judge.

The Court: When you say "All the other foundries," that takes in a lot of territory. How many foundries are you personally acquainted with?

A. Well, I visited in the last two years—let us see, I visited two other foundries but I was talking to Mr. Ryan of the Griffin——

Mr. Colley: (Interposing) I am going to object to what Mr. Ryan said or anybody else.

The Court: That would be hearsay, but you have personally seen other factories and visited them and seen what they did?

A. That is correct. I might add the Griffin Wheel Foundry—and I got this information from a reliable source two weeks ago——

Mr. Colley: (Interposing) I object to that.

Mr. Wulff: That may go out. You can't testify as to what anybody told you, what you know of your own knowl-[fol. 1110] edge you can testify.

The Court: What you saw or what you observed is all right.

A. Well, I haven't been down there recently so I can't say.

The Court: Were you there in 1950 in the summer time?

A. Yes, I was down there last year and they were using 100 per cent scrap at that time at the Griffin Wheel Foundry in Los Angeles.

The Court: May I interrupt just a minute, Counsel? Do I understand that no matter how old the wheel is or how long it has been on the car that it still maintains its chemical composition?

A. The chemical composition does not change. When we melt that wheel up, the high temperatures cause it to lose

some of the silicon and manganese, we have to add enough silicon or enough manganese to make up for what is lost.

The Court: I see.

A. And we have to meet the American Railroad Association——

The Court: (Interposing) That would be true more or less regardless of the age of the wheel?

A. That would be true regardless of the age.

The Court: It is the chemical composition that you are looking for more than anything else?

A. The old wheels they are practically identical with what we desire to produce.

The Court: Do you have any supervision over determination of whether a wheel is sufficiently old to be melted [fol. 1111] or whether it can be used some more or not?

A. No, that does not come under my supervision.

The Court: And when you get them they are supposed to be used for scrap?

A. They are beyond any use.

Mr. Wulff: Q. You testified that you added certain alloys. Will you tell us what you added and the purpose of it?

A. We add silicon and that part is what we call oxydized or burned out in the cupola and we add some manganese to neutralize the sulphur we pick up from the coke, and we add also some limestone to flux off the dirt off the wheels and also a little soda ash to help get some of the sulphur out of the molten iron.

Q. What is the purpose of the coke?

A. The coke serves two purposes, to keep the carbon level up to 3.4 and 3½ per cent and the other is to melt the scrap wheel.

Q. After the wheel is manufactured by you what do you do with it as far as you know?

A. While we are pouring the iron?

Q. No, the manufactured wheel?

A. The fully manufactured wheel, after it has been annealed through the pits?

Q. That is correct.

A. Then it has to be tested by our laboratory and they take two wheels out of every one hundred and the one wheel [fol. 1112] is subjected to a test, the tread of the wheel, about four inches wide and if the wheel hasn't been properly annealed, why this wheel will crack. Then on all wheels poured in that vicinity they will be rejected. And the other test that the wheel is subjected to is a drop test using a 250 pound weight which is dropped about 14 feet and that wheel has to stand twelve blows without a crack. If that wheel fails and cracks before the twelve blows, why the wheels poured in that vicinity will have to be scrap-ed.

Q. And when the wheel is all finished so far as the foundry is concerned what happens to it, where does it go?

A. After that we release the wheels after the laboratory work is done. Then we release the wheels to the stores department and that ends our jurisdiction. The wheels are all ours at the wheel foundry platform, and that is the end of our jurisdiction, and the stores department take over and ship from our platform.

Q. Have you any knowledge where the manufactured wheel is to be used?

A. Absolutely none.

Q. Are the wheels ever molded for a particular car?

A. Not to my knowledge. Now, I never heard of a wheel being molded for a particular car since 1933.

Q. In other words, they are all turned over to the stock department or stores department?

A. Yes, sir.

Q. The store department?

A. That is correct.

[fol. 1113] Q. Now, do you keep track of all the materials that go into the manufactured wheel?

A. Every part of it, everything, coke, sand, scrap iron, and alloys, limestone, and soda ash.

Q. What do you do with it?

A. At the end of the month we make totals of all used, one copy sent to the stores department and one to the accounting department in San Francisco.

Q. How about the labor cost?

A. The time cards are sent by our local timekeeping bureau down to the accounting department in San Francisco and they compile the time cards, tie them in, the labor costs with the costs of materials and then they get out a monthly statement of cost of an operation of the three foundries.

Q. Do you advise your accounting department of the number of wheels you put out each month?

A. We have to report to both the stores department and the accounting department the total number of wheels and the total weights of the wheels each month.

Q. And then they maintain a separate accounting system for your operation?

A. They do.

Q. And showing the profits of your operation?

A. That is correct, Sir.

Mr. Wulff: I think that is all.

[fol. 1114] Redirect examination:

By Nathaniel S. Colley, Esq., counsel on behalf of Plaintiff:

Q. On your visit to the Griffin Foundry when did you say that was?

A. That was about last May.

Q. And did you talk with the people at the Griffin Foundry?

A. Well, I always talk with the foundry superintendent because I wouldn't visit the foundry without asking for the superintendent.

Q. And it was in your talk with the superintendent that you found out what they were using in their foundry?

A. Not only talk with them but we walked from one end of the foundry to the other and we both saw the same thing, have the same thing in common, so we went from one end of the foundry to the other, and I not only talked with him but saw they used the 100 per cent scrap.

Q. You looked and saw they used 100 per cent scrap?

A. Not only in the foundry but in the coke yard and scrap yard and saw everything they had in the way of the scrap.

Q. When you say scrap wheels are used because they are ideal and ought to have the same composition what you are saying is that it is cheaper to use old wheels than anything else, isn't that what you are saying?

A. That is right, just one of the things. Of course, being cheaper is very important but it is a lot easier to hit a specification and keep your control of your wheel by using [fol. 1115] the old wheels because we have to have a chill that can't be less than a half inch thick of hard white iron and is not more than one inch. We have to wind up between one-half inch or one inch. If the wheel is outside that range it has to be scrapped, and by using the wheels of a correct chill the correct chemical composition is disposed of.

Q. This operation of making all new wheels out of old wheels, if it is going on, they melt something, they must have got started somewhere along the line.

A. That is a question that is sometimes asked. It is most confusing, but you can make wheel iron by taking steel and pig iron, but it is a very expensive process and you have high losses and I guess the first wheels made were made that way until they built up a big supply of scrap and now that scrap is almost self perpetuating. We have to add 3 per cent malleable now and the other foundries are probably adding a little malleable, and maybe 5 or 10 percent automotive scrap to make up that difference.

Q. But in any event you have never seen any operation where one of these wheels is repaired?

A. You can't machine cast iron wheels, they are too hard. It does not permit machining even with a carbide tool.

Q. So that when one wears out the only thing you can do is mold it into a new wheel?

A. That is correct.

Mr. Colley: That is all.

[fol. 1116] Mr. Wulff: No further questions.

The Court: Are these wheels we have been speaking about mostly wheels for freight cars?

A. All these wheels, Judge, are from freight cars.

The Court: We are not talking about passenger cars?

A. Passenger cars are all steel wheels.

The Court: These are all freight cars?

A. All freight car wheels.

The Court: Generally speaking are they all of a given size?

A. They are all the same size, 33 inch diameter wheel but they are different thicknesses. In other words, a 40 ton wheel goes under a 40 ton box car and a 50 ton wheel goes under a 50 ton box car; they are both 33 inches in diameter but one wheel, the 40 ton will weigh 700 pounds, and the 50 ton, 750 pounds.

The Court: So that when you release these finished products about all you know is that they are going to a certain size box car?

A. If we make 50 tons we know they are going under 50 ton box cars. Last year we averaged 321 wheels a day and there will be some 40's there and some 50's.

The Court: That includes all kinds of freight cars. How about flat cars?

A. The same thing, a 40 or 50 ton flat car.

The Court: Those wheels then are in common use as far [fol. 1117] as you know in all railroading, used on all the Southern Pacific lines?

A. All the Southern Pacific lines.

The Court: They are all standard width track?

A. They all have a standard tread in widths.

Mr. Colley: I have nothing further.

Mr. Wulff: Nothing further.

The Court: That is all.

Mr. Colley: The plaintiff rests so far as this phase of the case is concerned, your Honor.

Mr. Wulff: Defendant rests, your Honor.

The Court: The matter is then submitted factually?

Mr. Colley: Yes, on the jurisdictional question, yes.

The Court: On the jurisdictional question, of course. Counsel, I believe we have discussed the question of submitting this matter on briefs, and Mr. Colley I believe it would be your job to open. How many days would you want?

Mr. Colley: You can allow ten days. I expect to get it done earlier than that because as I have said before I am

thoroughly familiar with the law of it and it would be a matter of applying the law to the facts, as I understand it.

The Court: Ten, ten and five.

Mr. Colley: I don't know what the Court wants about any recital of the facts in this case. Do you want it transcribed, your Honor?

The Court: Oh, I don't ask that the—no, I have pretty full notes so far. I don't think it is necessary to transcribe [fol. 1118] the record unless we get into some difficulties. Later in the case I can notify counsel but I think the factual summary insofar as it brings out the points that you gentlemen wish to urge, the law points, are important.

Mr. Colley: I think I understand the facts. Of course, we can each say that. But when we start writing briefs we find we understand the facts in different ways.

The Court: Both sides can emphasize certain facts that they believe show their points better so that I think it is better for both sides to re-emphasize facts favorable to them. It will be ten, ten and five, and the matter will be submitted.

Mr. Wulff: That is right, your Honor.

(Which concluded the proceedings and testimony in the above entitled matter at said time and place.)

[fol. 1119] Reporter's Certificate to foregoing transcript omitted in printing.

[fols. 1120-1121] In Supreme Court of California, Sacramento County

Sacramento No. 6521

Hon. G. W. Bedeau, Judge

Roque Aranda, Plaintiff and Respondent,

vs.

Southern Pacific Co., a Corp., Defendant and Appellant

For App.: Devlin, Diepenbrock & Wulff, 1212 Calif. State Life Building, Sacramento.

For Resp.: Nathaniel S. Colley, 421½ "L" Street, Sacramento.

Docket Entries

July 30, 1954. Transferred to Supreme Court Jan. 20, '53

Filed Transcript Cl, R2 Appeal from Js & Os.

August 3, 1954. Lodged Exhibits Pltfs. 1, 2, 3 & 7. Defts A&D, B 1 thru 12.

Nov. 1, 1954. Ordered on Bank Calendar San Francisco Dec. 6, 1954.

Nov. 24, 1954. Filed So. Pac. Co. memo of oral argument.

Dec. 6, 1954. Causes called. Arthur B. Dunne argued for appellant and respondent Southern Pacific Company in all five cases. Mr. Hildebrand and Mr. Probst argued for respondent Gileo in S. F. 19090. Thomas G. Perkins argued for appellant Eufrazio in SAC 6522. Mr. Colley argued for appellant Moreno in SAC 6520 and for respondent Aranda in SAC 6521. Mr. Scalora waived oral argument for appellant Eelkin SAC 6523. Submissions Deferred.

April 29, 1955. Submitted.

April 29, 1955. Judgment is affirmed.

Gibson, C. J.

We concur: Shenk, J., Edmonds, J., Carter, J., Traynor, J., Schauer, J.

May 31, 1955. Remittitur issued.

[fol. 1122] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

ROQUE ARANDA, Plaintiff and Respondent,

v.

SOUTHERN PACIFIC COMPANY, a corporation, Defendant and Appellant.

Sac. 6521

OPINION—April 29, 1955

Plaintiff brought this action under the Federal Employers' Liability Act, seeking recovery for injuries sustained while working as a molder of freight car wheels in a foundry operated by defendant railroad company. He set forth three causes of action in his complaint, alleging that his injuries resulted, first, from negligent operation of a crane, second, from negligent maintenance of the crane, and, third, from failure to provide him with a safe place to work. The court, sitting without a jury, determined that the federal act was applicable, and the case then proceeded to trial before a jury on the other issues. A verdict was returned for plaintiff, and judgment was entered accordingly. Defendant appeals, contending that the federal act was not applicable and that there was not sufficient evidence to warrant submission [fol. 1123] to the jury of the issues raised by the third cause of action.

Applicability of the Federal Employers' Liability Act depends on whether plaintiff's duties were in the furtherance of interstate commerce or affected it "in any way directly or closely and substantially." (Gileo v. Southern Pacific Company, ante, p. —; 45 U.S.C.A. § 51.) The freight car wheels which he molded were manufactured in accordance with annual orders from defendant's store department. Although the amount of production varied according to current demand, the wheels were not made for particular railroad cars and were taken, when com-

pleted, to defendant's storehouse. A few were sold to other companies, but almost all were sold to the Southern Pacific Equipment Company, a subsidiary of defendant, for construction of new cars or were used by defendant for maintenance purposes, including replacement of wheels on cars which defendant already operated in interstate commerce.

Federal coverage has been extended to employees injured while performing duties similar to those involved here. (Shelton v. Thomson, 148 F. 2d 1 [operating a crane, located in a storehouse, to lift freight car wheels used to repair cars, including some which were operated in inter- [fol. 1124] state commerce]; Ericksen v. Southern Pacific Co., 39 Cal. 2d 374 [inspecting lumber for fitness as railroad ties, some of which would cross state lines and would be used to repair tracks carrying interstate traffic]; Trucco v. Erie R. Co. [Pa.], 45 A. 2d 20 [constructing "strap hangers" used to replace parts of engines, some of which were devoted to interstate commerce].) In the present case, some of the wheels which plaintiff molded were to be used in repairing railroad cars moving in interstate commerce, and the importance of his work to that commerce was not reduced by the fact that the wheels were temporarily stored before being used. We are of the opinion that plaintiff's duties furthered interstate commerce. He is, therefore, considered to have been employed by defendant in interstate commerce and is entitled to the benefits of the act. (Gileo v. Southern Pacific Company, ante, p. —.)

It is conceded that the evidence is sufficient to support the verdict based upon the first and second causes of action in which it was alleged that plaintiff's injuries resulted from the negligent operation of a crane and from the negligent maintenance of a crane. It is contended, however, that there was no evidence that defendant failed to provide plaintiff with a safe place to work, as alleged in the third cause of action and that [fol. 1125] the court erred in submitting this issue to the jury. Plaintiff worked near a large crane which stood in a circular area at the center of two concentric rings of wheel molds. Access to the crane through the double

ring of molds was afforded by two openings, each 21 feet wide. The crane was equipped with a horizontal boom and with a cable which was attached to the end of the boom and was strung down through several pulleys to a hook. Molten metal was carried from a furnace to the 21-foot openings by means of a bucket-shaped ladle placed on a movable platform. When the molder and his helper were ready to fill the molds, the crane hook was fastened to the handle of the ladle, and the crane raised the ladle vertically and maintained it in a position several inches above the molds. The ladle, which was about two feet in diameter, was open at the top and was designed to drain from the bottom. The molder was required to be close to the ladle in order to adjust it over each mold and to fill the mold by opening the stopper at the bottom of the ladle.

At the time of the accident, plaintiff was standing between the inner and outer rings of molds and was preparing to open the stopper. The cable attached to the [fol. 1126] end of the boom slipped from three clamps which were holding it, and the ladle dropped against a mold, tipping and spilling the contents of the ladle. Plaintiff, in attempting to escape from the molten metal, jumped over the inner ring of molds and landed in some of the spilled metal, suffering severe burns.

The degree of care required by the Federal Employers' Liability Act is that which a person of ordinary prudence would have exercised under the circumstances, and although there was no proof as to the practice in the industry with respect to the method commonly employed in the molding of wheels, evidence of custom is not indispensable. (Chicago, M. & St. P. Ry. Co. v. Moore, 166 F. 663, 668.) The fact that the metal was drained from the bottom of this container permitted an inference that, once the ladle was filled, a lid could have been placed on it without impeding the molding process. Pictures of the ladle and of the manner in which it was used were shown to the jury, and we cannot say as a matter of law that the jury could not properly conclude that it was feasible to equip the ladle with a lid which would have prevented the accident and that, in view of the hazard to workmen,

[fol. 1127] defendant should have provided such a lid. Accordingly, the issues raised by the third cause of action were properly submitted to the jury.

The judgment is affirmed.

Gibson, C. J.

We concur: Shenk, J., Edmonds, J., Carter, J., Traynor, J., Schauer, J.

[fol. 1128] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SAC No. 6521

ROQUE ARANDA, Plaintiff & Respondent,

vs.

SOUTHERN PACIFIC COMPANY, Defendant & Appellant

On Appeal from the Superior Court in and for the County of Sacramento

JUDGMENT—April 29, 1955

The above entitled cause having been heretofore fully argued, and submitted and taken under advisement; and all and singular the law and premises having been fully considered,

It Is Ordered, Adjudged, and Decreed by the Court that the Judgment of the Superior Court in and for the County of Sacramento in the above entitled cause, be and the same is hereby affirmed.

Respondent to recover costs on appeal.

I, William I. Sullivan, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 29th day of April, 1955, and now remaining of record in my office.

Witness my hand and the seal of the Court, affixed at my office, this 31st day of May, A. D. 1955.

William I. Sullivan, Clerk, by Paul Dinoia, Deputy.
(Seal.)

[fol. 1129] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 1130] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SACRAMENTO

ROQUE ARANDA, Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, Defendant

MEMORANDUM OPINION—February 15, 1952

This is a suit brought by the plaintiff against the defendant company, his employer, for damages alleged to have been sustained by plaintiff due to negligence of the defendant. The matter was set for trial before this Court, but before proceeding with the jury trial, it was stipulated that the Court should first hear and determine the question of whether or not the Federal Employers Liability Act was applicable. In other words, if this act is applicable, then the plaintiff may sue in the Superior Court. If, however, the Federal Act is not applicable, the plaintiff must be governed by the Workmen's Compensation Act and the matter heard before the Industrial Accident Commission of the State of California.

The Court heard evidence with regard to this issue, sitting without a jury, pursuant to said stipulation. It was established that the plaintiff was a molder, molding and assisting in the molding or casting of freight car and other wheels for the use of the Southern Pacific Company. He [fol. 1131] has been such for about thirty years. The Southern Pacific Company maintains the Sacramento Wheel Foundry at Sacramento, and has maintained this foundry for many decades. The facts which have been established have been well stated by both parties in their briefs, and there is no conflict with regard thereto.

The production in the wheel foundry is controlled by the defendant's stores department. At the beginning of the year the stores department gives the wheel foundry a blanket order to produce whels. These wheels are then

produced. Some of them are to be used as soon as axles are added, and others are stockpiled to be sent out wherever needed on the entire Southern Pacific line. Many of these wheels are immediately sent to Portland, Oregon, where the axle assembly is affixed, the wheel and axle unit returned to the Sacramento, California, repair shop, where they are fitted upon the trains as needed. It is admitted that these wheels will be affixed to hundreds of freight cars which are moving in interstate commerce. The company's experience has proven that the best and cheapest method of molding the new wheels is by the melting down of the old wheels and adding certain other alloys. When the wheels on the cars become too worn for continued use they are taken off and this process is adopted as herein set forth. There are no other provisions for the "repair" of such wheels. *This is the only way in which the cars change wheels.*

Since defendant's main argument is based upon a distinction made in many of the cases between "manufacture" and "repair", this basic fact must be definitely borne in mind.

The Federal Employers Liability Act as amended in 1939 (53 Stat. 1404) provides as follows:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall in any way directly or closely and substantially, affect such commerce as above set forth shall for the purposes of this act be considered as being employed by such carrier in such commerce, and shall be considered as entitled to the benefits of this act."

[fol. 1132] Defendant in a very instructive and exhaustive brief has pointed out the history of the legislation, but this Court feels that the cases prior to 1939 have little bearing on the issue here. The defendant's argument is based upon the long line of cases which have drawn a distinction between "manufacture" and "commerce". This has been true for the reason that many interstate carriers carry on many other activities. They might be engaged in running a local stage line, for instance, between, say, Sacramento and Stockton. If the activities were definitely only concerned

with that particular line, this could be definitely said to be intrastate. Large corporations such as the Southern Pacific Company also may engage in extra-curricular activities as is pointed out by defendants, such as the maintenance of an office building. Those are clear cases. On the other hand if the plaintiff in this case had been definitely "repairing" a door, for instance, on the side of a freight car which had just come in from Portland, Oregon, and as soon as the "repairs" were done, the car moved on to El Paso, Texas, this would be a clear case of interstate commerce. This would be so even if it were a brand new door.

We are dealing here, however, with that vast group of fringe cases where the activities are in a twilight zone. The difficulty which Courts have had for many years is to place a label upon such activities. It is frequently impossible to definitely label an activity as inter- or intra-state commerce. For that reason there has been a trend towards liberalizing of the statutes in these matters.

How then, shall we construe the language of the section hereinabove set forth? If we use the word "furtherance of interstate commerce" or "directly or closely and substantially affecting such commerce", in a broader sense we practically obliterate intrastate commerce. If on the other hand, we deal in such hair-splitting theories that "manufacturing" is a complete and separate and different [fol. 1133] business from that of "repairing" we will achieve just as absurd results in the other direction.

It is probably true that where a corporation is organized and does business strictly as a manufacturing concern such as the John Doe Car Wheel Company, which does nothing but manufacture car wheels and sell them indiscriminately, that this probably would not be held to be interstate commerce. However, there is a phase that enters into the case at bar, and that is that all of these operations are merely departmental units of the defendant corporation, and are controlled entirely by the defendant. Had this plaintiff been working for an entirely independent corporation which had nothing to do with the parent company, then this probably could be urged, but here the whole matter is handled under one parental roof, and it seems to this Court that the Congress had just such a thing in mind when they admittedly liberalized the Act in 1939.

In vigorously putting forth the argument that the plaintiff in this case was engaged strictly in manufacture, the defendant places great reliance on the fact that many of the wheels are stockpiled for a period, and are not actually consigned to a specific freight car, and earmarked at the time they are made. Since this is so, defendant argues that the activities of the plaintiff here could not be under the category of "repairs" because he was not actually working upon a definite car at the time. This seems to this Court to be a hair-splitting theory. The whole chain of activity started with the taking off of the old car wheels, which are worn out, the transferring of those old car wheels into a vat where they are melted down, the pouring of this new melted material into new molds, the creation of the new car wheel, the affixing of the axles and the subsequent attaching of those axles and car wheels to freight cars in interstate commerce, seems to this Court to be one single operation.

The mere fact that the plaintiff is not personally present at the side of the freight car when the old wheel is taken off or the new wheel is put on seems to this Court to be immaterial.

[fol. 1134] It seems to be self-evident that *No Wheel Can Be "Manufactured" Until Some Car Needs "Repair"*. This is absolutely true since the molten material cannot exist without the prior existence of the worn-out wheels. Without the first worn-out wheel there could be no creation of the new molten material. The mere fact that many of the wheels are stockpiled for a period does not seem to this Court to break the chain of causality between the creation of these new wheels and their running on the track, since it is the need for "repairs" which furnishes the material for the start of the so-called "manufacture". Thus if we must label this activity this Court would say that the process is both "manufacture" and "repair". The new wheels are in a sense "manufactured" and the cars are "repaired". It may be some time before a car which has lost its old wheels returns with its shiny new set on an interstate track, but it does not seem to this Court that time is of the essence here because the whole proceeding looks forward to and is indeed created for that purpose.

Thus it seems to this Court that even if we accept the

yardstick pointed out by the defendant that unless the plaintiff can show that he was engaged in "repairing" rather than "manufacturing," he has shown that sufficiently for the purposes of the liberalized statute.

This Court sees no useful purpose in discussing all the cases which have been presented by the parties. The holding in one case frequently brings to mind a somewhat contrary holding in a very similar case. The law by its very nature, is not and can never be an exact science. Each case must be decided upon its own factual background. This Court is of the opinion that the plaintiff has brought his case within the terms of the Act and that this Court has jurisdiction for the purposes of trial.

Let the necessary order be prepared in accordance herewith.

Dated: February 15th, 1952.

John Quincy Brown, Judge of the Superior Court.

[fol. 1135] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 1136] In Superior Court of Sacramento County

Hon. John Quincy Brown, Judge Superior Court, Presiding

Minute Order—February 15, 1952

87250

This matter was previously ordered to be submitted and now on this day the court being fully advised in the premises ordered that the matter be submitted and ordered that the plaintiff has brought his case within the terms of the Act and that this court has jurisdiction for the purpose of trial. Let the necessary order be prepared in accordance herewith.

[fol. 1137] Clerk's Certificate to foregoing paper omitted in printing.

[Vol. 1138] IN THE DISTRICT COURT OF APPEAL, STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT

3 Civil No. 8388

ROQUE ARANDA, Plaintiff and Respondent,

v.

SOUTHERN PACIFIC COMPANY, a Corporation, Defendant and Appellant

CERTIFICATE OF CLERK

I, L. A. Endres, Clerk of the District Court of Appeal, State of California, Third Appellate District, do hereby certify as follows:

The above entitled action was appealed to the above entitled Court from the Superior Court of the State of California in and for the County of Sacramento; briefs were thereafter filed in this Court by the parties to said action and said action was, by stipulation of the parties and Order of Court set down for oral argument and was argued before the above entitled court upon the same day that argument was had in *Epimenio Moreno* v. *Southern Pacific Company*, 3 Civil No. 8363, *Albert Eufrazia* v. *Southern Pacific Company*, 3 Civil No. 8428, and *Charles* [Vols. 1139-1141] *Eelk* v. *Southern Pacific Company*, 3 Civil No. 4881. Prior to submission of the above entitled cause and prior to any decision, judgment or opinion by the above entitled court the above entitled action was, by Order of the Supreme Court of the State of California, transferred to the Supreme Court of the State of California and the file in said action was thereupon transmitted to the Clerk of the Supreme Court of the State of California.

There is no decision or opinion or judgment of the above entitled court in the above entitled cause.

Witness my hand and the seal of the Court this 21st day of June, 1955.

L. A. Endres, Clerk of the District Court of Appeal, State of California, Third Appellate District. [Seal]

[fols. 1142-1143] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SACRAMENTO

No. 90452

ALBERT EUFRAZIA, Plaintiff & Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, Defendant and Respondent

CLERK'S TRANSCRIPT ON APPEAL

Appeal from the Judgment of the Superior Court of the State of California in and for the County of Sacramento

Hon. Malcolm C. Glenn, Judge

APPEARANCES

Thomas C. Perkins, 801 9th Street, Sacramento, California.

Devlin, Diepenbrock & Wulff, 926 J Street Building, Sacramento, California.

Counsel for Plaintiff and Appellant

Counsel for Defendant and Respondent.

[fol. 1144] IN SUPERIOR COURT OF SACRAMENTO COUNTY

COMPLAINT—Filed July 3, 1952

Plaintiff complains of defendant and for his first cause of action alleges:

I

That at all times herein mentioned defendant was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and doing business in the State of California and other states; that said defendant was at all times herein mentioned and now is engaged in the business of common carrier by railroad in interstate commerce in California and other states.

II

That at all times herein mentioned plaintiff was employed by defendant in such interstate commerce and the injuries herein complained of arose while plaintiff and defendant were so engaged in the conduct of said interstate commerce.

III

That this action is brought under and by virtue of the provisions of the Federal Employers' Liability Act, 45 USCA Sec. 51, et seq.

IV

That on or about the tenth day of July, 1951, plaintiff was employed by defendant as a carman working in defendant's railroad shops in the City of Sacramento, County of Sacramento, State of California; that at said time and place, and while acting in the regular course and scope of his duties, plaintiff was required to and was engaged [fol. 1145] in reaming holes in a car gondola with a reamer; that defendant was negligent in respect to and concerning said reaming; that due to and as a direct and proximate result of the said negligence of the defendant, plaintiff was struck by said reamer and knocked down with great force and violence and was caused to sustain severe personal injuries hereinafter more fully enumerated.

V

That as a direct and proximate result of the said negligence of defendant, as aforesaid, plaintiff was permanently disabled, rendered sick, sore, lame, and disabled and disordered both internally and externally, sustained a severe shock to his nervous system, and was caused to suffer extreme pain and anguish.

VI

That immediately prior to sustaining the aforesaid injuries plaintiff was a strong and able-bodied man, capable of earning approximately $15.999 per day; that by reason of the negligence of defendant, as aforesaid, and the injuries proximately caused thereby, plaintiff has been un-

able to work at various intervals and will be, for an indefinite period of time in the future, rendered incapable of performing his usual work and services, all to his damage in an amount as yet unascertainable, and plaintiff asks leave that when said amount is ascertained it may be inserted herein in the amount of $_____ as the amount of wages plaintiff has lost and which he would have earned had it not been for said injuries caused as aforesaid.

VII

[fol. 1146] That in treating said injuries caused as aforesaid, it will be necessary for plaintiff to employ physicians and surgeons, to be hospitalized, to require attendants, treatment, X-rays and medicines; that the amount of the cost of said treatment at this time is unascertainable; and plaintiff asks that when the said costs are ascertained, they may be inserted herein as plaintiff's further damage in the amount of $_____.

VIII

That as a direct and proximate result of the negligence of defendant, as aforesaid, plaintiff has been generally damaged in the sum of $86,400.00.

As a second, separate, further and distinct cause of action plaintiff alleges:

I

Plaintiff incorporates herein by reference the allegations contained in paragraphs I to III, inclusive, and V to VIII, inclusive, of his first cause of action herein with the same force and effect as though they were fully set forth herein.

II

That on or about July 10, 1951, plaintiff was employed by defendant as a carman working in defendant's railroad shops in the City of Sacramento, County of Sacramento, State of California; that at said time and place and while acting in the regular scope and course of his duties, plaintiff was required to and was engaged in reaming holes in a car gondola with a reamer; that defendant negligently failed to provide adequate or sufficient men for said task;

that as a direct and proximate result of defendant's negli-
[fol. 1147] gence as aforesaid, plaintiff was struck by said reamer and knocked down with great force and violence and was caused to sustain severe personal injuries hereinabove more fully enumerated.

As a third, separate, further and distinct cause of action plaintiff alleges:

I

Incorporates herein by reference the allegations contained in paragraph I of his second cause of action herein with the same force and effect as though they were fully set forth herein.

II

That on July 10, 1951, plaintiff was employed by the defendant as a carman working in defendant's railroad shops in the City of Sacramento, County of Sacramento, State of California; that at said time and place and while acting in the regular course and scope of his duties, plaintiff was required to and was engaged in reaming holes in a car gondola with a reamer; that defendant was negligent at said time and place in failing to provide plaintiff with safe appliances and equipment with which to perform his work and duties at said time and place; that as a direct and proximate result of said negligence, plaintiff was struck by said reamer and knocked down with great force and violence and was caused to suffer severe personal injuries as hereinabove enumerated.

As a fourth, separate, further and distinct cause of action plaintiff alleges:

I

[fol. 1148] Incorporates herein by reference paragraph I of his second cause of action herein with the same force and effect as though the allegations therein contained were fully set forth herein.

II

That on July 10, 1951, plaintiff was employed by defendant as a carman working in defendant's railroad shops in the City of Sacramento, County of Sacramento, State of California; that at said time and place and while acting in

the regular scope and course of his duties, plaintiff was required to and was engaged in reaming holes in a car gondola with a reamer; that at said time and place defendant was negligent in failing to provide plaintiff with a safe place in which to work; that as a direct and proximate result of defendant's said negligence, plaintiff was struck by said reamer and knocked down with great force and violence and was caused to suffer severe personal injuries as hereinabove enumerated.

Wherefore, plaintiff prays judgment against defendant for general damages in the amount of $86,400.00; for his loss of wages in the amount of $; for his expenses incurred in employing physicians, surgeons, and attendants, for X-Rays, medicines and treatment in the amount of $; for his costs of suit incurred herein; and for such other and further relief as to the Court seems meet and proper.

(s) Thomas C. Perkins, Attorney for plaintiff.

[File endorsement omitted]

[fol. 1149] In Superior Court of Sacramento County

Answer—Filed Aug. 7, 1952

Now comes the Southern Pacific Company, a corporation, the defendant above named, and answering the first alleged cause of action set forth in the complaint of plaintiff on file herein admits, denies and alleges as follows, to wit:

I

Denies each and every, all and singular, the allegations set forth in Paragraphs II, III, IV, V, VI, VII and VIII, and each thereof, save and except that the defendant admits that the plaintiff was employed by the defendant as a carman in its new freight car manufacturing program being conducted in the defendant's railroad shops in the City of Sacramento, State of California, at the time of plaintiff's alleged injuries, and in further answer to Paragraph VIII, defendant specifically denies that the plaintiff has been

damaged in the sum of Eighty-Six Thousand Four Hundred Dollars ($86,400.00), or any other sum or sums whatsoever, or at all.

Answering the second alleged cause of action set forth in said complaint of plaintiff on file herein, this defendant admits, denies and alleges as follows, to-wit:

I

Answering Paragraph I of the second alleged cause of action, the defendant refers to Paragraph I of its answer to the first alleged cause of action, and by reference thereto, makes said Paragraph I a part hereof for every purpose to the same extent as though said paragraph was fully set forth herein.

[fol. 1150] II

Denies each and every, all and singular, the allegations set forth in Paragraph II of said second alleged cause of action, save and except that the defendant admits that the plaintiff was employed by the defendant as a carman in its new freight car manufacturing program being conducted in the defendant's railroad shops in the City of Sacramento, State of California, at the time of plaintiff's alleged injuries.

Answering the third alleged cause of action set forth in said complaint of plaintiff on file herein, this defendant admits, denies and alleges as follows, to-wit:

I

Answering Paragraph I of the third alleged cause of action, this defendant refers to Paragraph I of its answer to the first alleged cause of action, and by reference thereto, makes said paragraph I a part hereof for every purpose to the same extent as though said paragraph was fully set forth herein.

II

Denies each and every, all and singular, the allegations set forth in Paragraph II of said third alleged cause of action, save and except that the defendant admits that the plaintiff was employed by the defendant as a carman in

its new freight car manufacturing program being conducted in the defendant's railroad shops in the City of Sacramento, State of California, at the time of plaintiff's alleged injuries.

Answering the fourth alleged cause of action set forth in said complaint of plaintiff on file herein, this defendant [fol. 1151] admits denies and alleges as follows, to-wit:

I

Answering Paragraph I of the fourth alleged cause of action, this defendant refers to Paragraph I of its answer to the first alleged cause of action, and by reference thereto, makes said paragraph I a part hereof for every purpose to the same extent as though said paragraph was fully set forth herein.

II

Denies each and every, all and singular, the allegations set forth in Paragraph II of said fourth alleged cause of action, save and except that the defendant admits that the plaintiff was employed by the defendant as a carman in its new freight car manufacturing program being conducted in the defendant's railroad shops in the City of Sacramento, State of California, at the time of plaintiff's alleged injuries.

As and for a second, further and separate defense to all of the alleged causes of action set forth in said complaint, and without prejudice to the defense hereinabove set forth, defendant, avers:

That the above entitled Court has no jurisdiction of the subject matter of any of the alleged causes of action set forth in the complaint of plaintiff.

As and for a third, further and separate defense to all of the alleged causes of action set forth in said complaint, and without prejudice to the defense hereinabove set forth, defendant avers:

That at the time and place mentioned in said complaint on [fol. 1152] file herein, plaintiff so negligently and carelessly conducted himself in and about his work so as to cause himself to fall and all injuries and/or damages suf-

fered by plaintiff were caused and contributed to by said negligence and carelessness of plaintiff.

As and for a fourth, further and separate defense to all of the alleged causes of action set forth in said complaint, and without prejudice to the defense hereinabove set forth, defendant avers:

That at the time and place mentioned in said complaint on file herein, plaintiff so negligently and carelessly conducted himself in and about his work so as to cause himself to fall and that the sole proximate cause of any and all injuries and/or damages suffered by plaintiff was the said negligence and carelessness of said plaintiff.

Wherefore, defendant prays that plaintiff take nothing by his said complaint, and that it be hence dismissed and defendant recover its costs of suit herein incurred.

Dated: August 4th, 1952.

(s) Deylin, Diepenbrock & Wulff, Attorneys for Defendant.

Duly sworn to by Roy G. Hillebrand jurat omitted in printing.

[fol. 1153] [File endorsement omitted]

[fol. 1154] In Superior Court of Sacramento County

Notice of Motion for Order to Proceed to Trial of Special Defense Before Trial of Any Other Issue, Pursuant to Section 597, Code of Civil Procedure.—Filed Oct. 10, 1952

To the above named Plaintiff and to his Attorney:

You and each of you please take notice that the above named defendant will move the above entitled court in Department No. 4 thereof, in the Courthouse on I Street, between 6th and 7th Streets, Sacramento, California, at the

hour of 9:15 A. M., on Thursday, October 16, 1952, or as soon thereafter as counsel may be heard for an order that the court proceed to the trial of the second special defense set forth in the answer of the defendant, to-wit, that the Court has no jurisdiction over the subject matter of the above entitled action or any of the alleged causes of action set forth in said complaint of plaintiff before trial of any other issue in the case.

This motion will be based upon the ground that this Court has no jurisdiction over the subject matter of the above entitled action nor any of the causes of action set forth in said complaint of plaintiff, but that the jurisdiction over such subject matter is exclusively vested in the Industrial Accident commission pursuant to the Labor Code of the State of California, and that plaintiff at the time of his injuries and for a substantial period prior thereto, was engaged exclusively with others in the construction of new freight cars which have never been used directly or indirectly in interstate commerce; that said motion will be supported by oral and documentary evidence to be adduced and upon the files of this Court and this notice of motion. [fol. 1155] In support of this motion, the defendant will rely upon Section 597 of the Code of Civil Procedure of the State of California.

Dated; October 9th, 1952.

(s) Devlin, Diepenbrock & Wulff, Attorneys for Defendant.

Affidavit of Mailing (omitted in printing)

[fol. 1156] [File endorsement omitted]

[fol. 1157] IN SUPERIOR COURT OF SACRAMENTO COUNTY

ORDER TO PROCEED TO TRIAL OF SPECIAL DEFENSE BEFORE TRIAL ON ANY OTHER ISSUE PURSUANT TO SECTION 597 OF THE CODE OF CIVIL PROCEDURE.—Oct. 14, 1952

The motion of the above named defendant for an order to proceed to trial upon its special defense of the want of jurisdiction of the above entitled Court over the subject matter of the above entitled action before the trial of any other issues, pursuant to Section 597 of the Code of Civil Procedure, came on regularly this day to be heard, the defendant appearing through its attorneys Messrs. Devlin, Diepenbrock & Wulff and the plaintiff appearing through his attorney Thomas C. Perkins, Esq., and it appearing to the Court that due and legal notice of said motion has been given and evidence having been adduced, and the Court being duly advised,

It is hereby ordered that the above entitled court, sitting without jury, proceed to the trial of the second special defense set forth in the answer of the defendant on file herein, to-wit, the defense that the Court has no jurisdiction over the subject matter of the above entitled action or any of the alleged causes of action set forth in said complaint of plaintiff, before the trial of any of the other issues in the case, and that said trial be and the same is hereby set for the 30th day of October, 1952.

Dated: October 14, 1952.

(s) Jay L. Henry, Judge of the Superior Court.

[File endorsement omitted]

[fol. 1158] IN SUPERIOR COURT OF SACRAMENTO COUNTY

OPINION—December 31, 1952

The question presented to the Court is whether or not the plaintiff, who was injured while working for the Southern Pacific Co. on ends to be placed on gondolas, is entitled to bring a suit for his alleged damages under the Federal

Employers' Liability Act, or whether his remedy is under the California Workmen's Compensation Act.

The question arises mainly by reason of the amendment of the Federal Employers' Liability Act passed in 1939. There is no question but that the provisions thereof have broadened the scope of those who may come within its terms; however, it has been definitly determined that not all employees working for a railroad and who are injured may claim the right to bring suit thereunder.

The facts are not in serious dispute. Therefore, it will not be necessary to make reference thereto to any great extent. The Southern Pacific Co. had entered upon a large expansion program, among which was the acquisition of one thousand gondola cars. These cars were being assembled or fabricated in Car Shop 9 of the S. P. Co. for the Southern Pacific Equipment Co. (hereafter referred to as the SPEC.)

In order to finance the plan of expansion, various contracts and obligations were necessary to be entered into.

The Southern Pacific Equipment Co. is a subsidiary of the S. P. Co. It is wholly owned by said Company, but with a differenct Board of Directors. It will be noted also that these gondolas are stenciled "T & NO", which stands [fol. 1159] for Texas and New Orleans R. R. Co., another subsidiary of the S. P. Co.

The financial company is The Pennsylvania Company for Banking and Trusts, Trustee. These matter- are all set forth in defendant's Exhibit "F".

While the SPEC and T & NO R. R. Co. are subsidiaries of the S. P. Co., they are not, strictly speaking, the alter ego of the latter railroad company. There is no question but that the entire scheme for the S. P. Co. acquiring additional equipment was a legitimate project, and the various companies mentioned above were necessary, or at least desirable, in order to work out a plan of financing the program of expansion. In this regard reference is made to the cases of Cleaning and Pressing co. vs. Hollywood L. Service, 217 Cal 124, 129; Erkerbrecher vs. Grant, 187 Cal 7, 11.

Plaintiff had been assigned to work in car shop nine as a reamer on the ends of the gondola cars. He was injured

while so working on July 10th, 1952, a period of a little less than a month after his assignment.

The Federal Employers' Liability Act was amended in 1939, which greatly broadened the scope of those working for the various railroad companies who may bring suit under the provisions of said act.

The case is important to both sides. The question whether or not an employee of a railroad comes within its provisions is one of law; and this is true even though the facts may be in dispute. (Scarborough vs. Penn. Railroad, 32 A 2d, 603.)

[fol. 1160] The question presented raises the jurisdictional point whether the federal act applies or the injured workman or his family, if he happened to be killed, shall make claim under the provisions of the Workmen's Compensation Act? According to the decided cases involving this question, there is no alternative, even though the employee or the employer or both wish to proceed under the one or the other. The facts determine the remedy. Therefore, it may be, as existed in one of the cases cited by plaintiff, the workman so injured had secured an award under a Workmen's Compensation Act, but the employer, railroad, attacked the jurisdiction of the board making the award, and the Federal Court reversed the award and held that the Federal Act applied. (Scarborough vs. Penn. Ry. Co., 35 A 2d, 603.)

It will be noted that if it be ultimately held, as several of the cases cited by plaintiff hold, that all employees of railroads engaged in interstate commerce come within the provisions of the Federal Act, then the provisions of the Workmen's Compensation Act of this state becomes a dead letter so far as they are concerned. In other words, under such a theory, such employees who may be injured will be deprived of the benefits of the provisions of said Workmen's Compensation Act.

The statement of one or two courts to the effect that *all employees of such railroad* come within the provisions of the Federal Act was probably inadvertently made, or made without careful study of the act after amendment, *for the majority of the cases not only hold to the contrary, but such a determination would make the Federal Act as vul-*

nerable to attack from a constitutional standpoint as it was [fol. 1161] *in its first enactment.*

There are really two aspects to this case: First: What was plaintiff doing at the time of the accident in his work in Car Shop 9? Second: Was this a temporary employment, so that the Court may consider his job prior to such employment or assignment to Car Shop 9?

First: Plaintiff was working as a reamer on ends to be attached to the gondolas. The SPEC was employing the S. P. Co. to assemble the cars. It was entirely new construction. True these cars were eventually to become a part of its own system, but the method of financing the program of expansion was through two subsidiary corporations, and through a financing company. The S. P. Co. only acquired a lease to the gondolas, which would ripen into a title when the underlying certificates were paid to the financing company.

It is deemed unimportant so far as the matter of financing the program of extension is concerned, except so far as the facts show that the employees of Car Shop 9 were engaged in new construction of assembling or fabricating material for the building of the gondola cars for SPEC.

If plaintiff is entitled to maintain a suit under the Federal Act for his injury, then it would seem to the Court, that we must hold that even the men who work on the material first delivered to Car Shop 9, before any fabrication was started, would be entitled to bring suit under such act, if injured. We might go even further, and, for like reasons, come to the conclusion that those who drew the plans for the construction of the gondolas would, in case of injury, [fol. 1162] be forced to bring suit therefor under the Federal Act. But it is the view of this Court that there can be no such holding, as will appear hereafter.

Adverting now to some of the principal cases after the amendment of the Act, while there still appears to be some uncertainty in the minds of some Courts under the facts in the individual case, there appears to be no dissent where there is new construction, particularly under facts somewhat parallel to those of the instant case, from the holding that the Federal Act does not apply.

Let us first take the Erickson case, (39 A C 385): That case, strongly relied upon by plaintiff, clearly distinguishes between new construction and the facts of the case itself. In this regard it is stated: "(3) It has been held that work on new tracks not yet in service is not covered by the act." Citing Moser vs. Union Pac. R. Co., 65 Idaho 479; 147 P 2d, 336, 153 ALR 341. With this statement the Court has in effect approved the holding in the case cited. Turning to the case cited, which contains a long and careful analysis of innumerable decisions both before and after the amendment of the Federal Act in 1939, we find the following:

> "While, at least prior to the 1939 amendment, a railroad employee engaged in new construction, as distinguished from repair or maintenance work, was generally held not to be engaged in interstate commerce within the purview of the federal act, the courts by no means agreed as to the tests by which to ascertain [fol. 1163] whether a certain activity constituted new construction or repair (maintenance) work. As stated in Gulf, M. & N. R. Co. v. Madden (1941) 190 Miss 374, 200 So 119, the difficulty consisted in applying the distinction between new construction and repair or maintenance work to a given state of facts.
>
> As in other instances, such a distinction is easily drawn in clear-cut cases; where a new instrumentality is to be erected for future use in interstate commerce and the work is carried out far away from any instrumentality then in existence and used at that time for interstate commerce, as where the first railroad is constructed through a certain territory, the work is undoubtedly to be classified as new construction work. Conversely, where an instrumentality that, at the time of work, is being used in interstate commerce, is maintained in an effective condition by taking care of its existing parts and without adding new appliances, as where loose spikes in ties are tightened while the road is being used in interstate commerce, the work is as clearly to be classified as repair or maintenance work.
>
> The difficulties arise from situations in the 'twilight zone,' in which the work is concerned at the same time with new appliances or structures which, though

intended to be used in interstate commerce, have not yet been so used at the time of the accident, and also with instrumentalities then in existence which at that time are actually being used in interstate commerce. [fol. 1164] As to these situations the courts have recognized that it is sometimes difficult to draw the line of demarcation between construction work and repair or maintenance work. See, for instance, Oregon Short Line R. Co. v. Gubler (1925); (CCA 8th) 9 F (2d) 494 (writ of certiorari denied in (1926) 273 US 709, 71 L ed 851, 47 S Ct 100); Wallace vs. New York, N. H. & H. R. Co. (1923) 99 Conn 404, 121 A 878; Ross v. Sheldon (1916) 176 Iowa 618, 154 NW 499; Boyer v. Pennsylvania R. Co. (1932) 162 Md 328, 159 A 909; Lombardo v. Pittsburgh & L. E. R. Co. (1927) 91 Pa Super Ct 307.

Since it is impossible to reconcile the inconsistent classifications made by the courts in the doubtful situation just described, the courts have held that each case must be decided in the light of its own peculiar facts. Wallace v. New York, N. H. & H. R. Co. (1923) 99 Conn 404, 121 A 878; Moser v. Union P. R. Co. (Idaho) (reported herewith) ante, 341; Lewis v. Cleveland, C. C. & St. L. R. Co. (1926) 240 Ill App 332.

Stating that the line between new construction and repair or maintenance work is sometimes difficult to draw and is, in reality, one of degree rather than of real difference, the court in Wallace v. New York, N. H. & H. R. Co. (1923) 99 Conn 404, 121 A 878, said: 'No hard and fast rule can be devised by applying which we can automatically place a given case in the new construction column, or in the repair and maintenance column. Each case must be decided upon its own facts. [fol. 1165] Some will be so clear as to classify themselves, but the majority of the contested cases will range themselves not far from the border line between these two classes of cases.'

Attempts have also been made to describe in abstract language the line of demarcation. 'Whatever may be necessary to keep the subsisting railway, its structures and equipment, in a safe state for interstate

traffic, or to maintain it in that state and improve the state, may be said to be an act of repair, which commonly embraces not only restoration but also renovation or renewal by any process of making good, strengthening, supplying, or mending. Century Dictionary, "repair"; Inglis v. Buttery (1878) LR 3 App Cas (Eng) 552, 565, 579—HL. In those instances where difficulty arises in determining whether labor or betterment upon an interstate line of railway is new construction work or repair and maintenance, the trend of decisions indicates that the doubt should be resolved in favor of the latter conclusion.' Boyer vs. Pennsylvania R. Co. (1932) 162 Md 328, 159 A 909. To the same effect is Ross v. Sheldon (1916) 176 Iowa 618, 154 NW 499.

'It is common knowledge that railroad bridges are repaired by replacement of parts thereof, and frequently by the erection of new bridges, and at the same time commerce is carried on thereover without interruption. The erection of new parts or of a new bridge, under these conditions, is clearly the repair of the old [fol. 1166] bridge, and the fact that the old bridge is being used while the repairs are being made does not take it out of the use of the railway company in its duty as a common carrier of interstate commerce.' State vs. Bates & R. Constr. Co. (1916) 91 Wash 181, 157 P 482.

'A careful study of the authorities called to our attention has convinced us that the dividing line between the two classes of cases is whether the construction is an original construction never having been dedicated to interstate commerce, or whether it is the repair, rebuilding, replacement, or enlargement of an interstate instrumentality after it has been so characterized by use. The question is not whether the instrumentality, when repaired, reconstructed, or enlarged, is entirely made of new material or of a new design or of a larger size, but whether or not it is still the original instrumentality, repaired, reconstructed, or enlarged, retaining the same location and existing for the same purpose. Repairs may be made by re-

placing an instrumentality in whole or in part so long as the purpose is to remedy a defect or supply an insufficiency. The object of enlarging the turntable was to supply a deficiency, therefore the rebuilding of it belongs to the operations designated as repairs when distinguished from original constructions.' **Lombardo** v. Pittsburgh & L. E. R. Co. (1927) 91 Pa Super Ct 307."

[fol. 1167] Looking at the amendment to the act it will be noted that it contains these provisions: "Any employee of a carrier, any part of whose duties shall be the furtherance of interstate commerce or foreign trade; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purpose of this chapter, be considered as being entitled to the benefits of this chapter." So far as the first clause is concerned, it would seem quite clear that making new equipment for another corporation, although employed by the S. P. Co., cannot be said to be duties in furtherance of interstate or foreign commerce. New construction has nothing to do with commerce. Does such work fall within the provisions of the second clause of the amendment? Does it in any way directly or closely and substantially affect such commerce?

Plaintiff was engaged in new construction work; the material was purchased by SPEC and delivered to the S. P. Co. by whom plaintiff was employed. Of course the fabrication of the gondolas, under such circumstances, had nothing to do with commerce, of any kind. Plaintiff's work was finished and completed when the gondolas were delivered or shipped by SPEC to its consignors.

Does the fact that new construction work such as involved herein, bring one who works thereon within the provisions of the Federal Act? The only argument which can be made in the affirmative is to claim that after the assembling or fabrication of the gondolas they were immediately placed on the S. P. Co. tracks for transportation to points outside of the State of California, and that the [fol. 1168] assembling of these parts with the immediate shipment by rail over the S. P. Co. lines does closely and substantially affect such commerce.

Thus, the activity of plaintiff must affect or produce some effect or influence on interstate commerce. The only work plaintiff does can have no possible influence or effect on commerce. His work is finished before the gondolas are turned over to the SPEC for shipment. Where equipment, such as engines and other rolling stock is brought in for repair, the men who work thereon affect interstate commerce, because the work they are doing is in furtherance thereof and which affects the same; the same is true of switchmen because they are handling interstate commerce traffic, and under the 1939 amendment they need not be so handling the same at the moment of an accident whereby such switchman was injured.

It is true that the amendment must be given a liberal construction in favor of the employees, but this does not justify an interpretation which does violence to the apparent intent of the wording of the act itself.

Second: Plaintiff makes the claim that prior to his assignment to Car Shop 9, he was working in interstate commerce; that he was only temporarily assigned to the work in Car Shop 9; that he was liable to be called by the S. P. Co. at any time to do his work in which he formerly was engaged, and hence when he was injured he was still privileged to sue under the provisions of the federal act.

The facts which were developed at the hearing showed that there was nothing said about whether the work in Car [fol. 1169] Shop 9 was to be merely temporary or more or less permanent. There was no testimony in the case, nor any intimation, that plaintiff was to be withdrawn from his employment of reaming ends of the gondolas. The expansion program required the construction of 1000 gondola cars, together with other cars which are not particularly involved in this proceeding. If we examine the photographs introduced in evidence as to the activities in Car Shop 9 in assembling these gondola cars, we note that it is a very large and continuous project. When the work started on the assembling of these gondolas does not appear; but there is an agreement which is dated September 29th, 1950, between the SPEC and the S. P. Co. in regard to the construction of the program of expansion. (Deft. Exhibit B). In defendant's Exhibit K, it refers to an order for 380 of

the gondola cars, which appears to be the first order made for the payment to be made thereon. From the surrounding circumstances it may be a long time before all of those gondola cars are completed. How long, whether months or several years, was not disclosed by the evidence, so far as the Court can recall.

Plaintiff relies upon the case of Scarborough vs. Penn. R. Co., supra, in his claim that even though he was not working in interstate commerce at the time of his injury, he may still claim the privileges of the act, as above noted. The case is in no way parallel in its factual aspects with the case at bar. The injured employee was regularly employed as a signalman. For some weeks he had been employed in installing new station lights, and was so employed [fol. 1170] at the time of the accident. The Court points out that both employments came within the provisions of the Federal Employers' Liability Act. In the course of the opinion the Court states: "... If any part of the employee's duties (at the time of his injury or death) directly, closely, or substantially affected interstate or foreign commerce, the claimant would be considered entitled to the benefit of the act. The preponderance of service performed by railroad employees is interstate commerce. As to those who are constantly shifting from one class of service to another, the adoption of the amendment will provide uniform treatment in the event of injury or death while so employed." In quoting this portion of the amendment no intimation is intended that it is only where there is a shifting of employees as stated which is covered by the amended act; but that is one provision which has been definitely settled in favor of the employee.

In view of the foregoing, it is concluded that plaintiff must seek his remedy within the provisions of the California Workmen's Compensation Act, and not under the Federal Employers' Liability Act.

Dated: Dec. 31, 1952.

(s) Malcolm C. Glenn, Judge of the Superior Court.

[File endorsement omitted]

[fol. 1171] IN SUPERIOR COURT OF SACRAMENTO COUNTY

FINDINGS OF FACT AND CONCLUSIONS OF LAW.—
Filed Jan. 26, 1953

That the answer of the defendant filed in the above entitled matter pleads that the above entitled court has no jurisdiction of the subject matter of any of the alleged causes of action set forth in the complaint of plaintiff, and pursuant to Section 597 of the Code of Civil Procedure, the above entitled Court, upon motion of the above named defendant, heretofore having duly and regularly proceeded to the trial of said special defense before trial of any other issue in the case, Honorable Malcolm C. Glenn presiding, a jury having been waived by the respective parties hereto, the plaintiff appearing by his attorney Thomas C. Perkins, Esq., and the defendant Southern Pacific Company acting by its attorneys Messrs. Devlin, Diepenbrock & Wulff, and evidence both oral and documentary having been adduced, the said special defense having been argued, briefed and submitted and after due consideration of the same, the Court now makes in writing the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT.

I

That at all times mentioned in said complaint the defendant Southern Pacific Company was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and doing business in the State of California; that said defendant was at all times mentioned in said complaint and now is engaged in several businesses, among which are and is a common carrier by railroad in [fol. 1172] both interstate and intrastate commerce and the assembling and/or manufacturing of new railroad freight cars as an independent contractor for the Southern Pacific Equipment Company.

II

That on the 10th day of July, 19[illegible], and for some time prior thereto, the plaintiff was employed by the defendant

as a mechanic in the assembling and manufacturing of such new railroad freight cars which the defendant had contracted to assemble and build as an independent contractor pursuant to the terms of a written contract with the Southern Pacific Equipment Company, and that at all times herein mentioned the plaintiff and the defendant were not engaged in the conduct of the latter's business of a common carrier by railroad, but at all of such times were engaged in its business of assembling and/or manufacturing new freight cars as hereinabove stated.

III

That at all times herein mentioned no part of plaintiff's duties as such mechanic directly, closely and/or substantially affected or was in furtherance of said interstate or foreign commerce (as a carrier by railroad engaging in commerce between some of the several states).

Conclusions of Law.

As Conclusions of Law from the above and foregoing Facts, the Court holds as follows:

I

That the above entitled Court has no jurisdiction over [fol. 1173] the subject matter of the above entitled action and that plaintiff must seek his remedy pursuant to the provisions of the California Workmen's Compensation Act.

II

That the plaintiff take nothing by his said complaint and that defendant do have judgment against plaintiff above named and its costs of suit herein incurred.

(s) Malcolm C. Glenn, Judge of the Superior Court.

[File endorsement omitted]

[fol. 1174] In Superior Court of Sacramento County

Objection to Findings of Fact and Conclusions of Law.—Filed Jan. 26, 1952

The plaintiff hereby objects to the Findings of Fact and Conclusions of Law on file herein on ground that said findings are contrary to the evidence and the law.

In addition plaintiff hereby objects to Paragraph II of said findings of fact on the ground that said findings are not sufficiently specific in stating "That on the 10th day of July, 1951, and for *some time* prior thereto, etc.". The specific "time prior thereto" should be stated in said findings.

(s) Thomas C. Perkins, Thomas C. Perkins, Attorney for Plaintiff.

Affidavit of Mailing (omitted in printing)

[fol. 1175] [File endorsement omitted]

[fol. 1176] In Superior Court of Sacramento County

Judgment.—Jan. 26, 1953

That the answer of the defendant filed in the above entitled matter pleads that the above entitled Court has no jurisdiction of the subject matter of any of the alleged causes of action set forth in the complaint of plaintiff, and pursuant to Section 597 of the Code of Civil Procedure, the above entitled Court, upon motion of the above named defendant, heretofore having duly and regularly proceeded to the trial of said special defense before trial of any other issue in the case, Honorable Malcolm C. Glenn presiding, a jury having been waived by the respective parties hereto, the plaintiff appearing by his attorney Thomas C. Perkins, Esq., and the defendant Southern Pacific Company acting by its attorneys Messrs. Devlin, Diepenbrock & Wulff, and evidence both oral and documentary having been adduced,

the said special defense having been argued, briefed and submitted, and pursuant to the order of the Court, Findings of Fact and Conclusions of Law, have been heretofore prepared and proposed by the defendant, which said proposed findings were duly served upon the attorney for plaintiff, and there being no amendments proposed within the time allowed by law, or at all; and the Court having heretofore made and filed in writing its Findings of Fact and Conclusions of Law, and directed that judgment be entered in accordance therewith;

Now, therefore, it is ordered and adjudged as follows, to-wit:

1. That the plaintiff take nothing by his said action and [fol. 1177] that said action be, and the same is, hereby dismissed.

2. That the defendant do have and recover its costs of suit against said plaintiff, taxed in the sum of ($).

Dated: January 26, 1953.

(s) Malcolm C. Glenn, Judge of the Superior Court.

Attest: C. C. LaRue, Clerk. By: Charles L. Fischer, Deputy.

[File endorsement omitted]

[fol. 1178] In Superior Court of Sacramento County

Notice of Appeal.—Filed Jan. 29, 1953

To the Clerk of the above entitled court:

You will please take notice that the plaintiff, Albert Eufrazia, in the above entitled action, hereby appeals to the District Court of Appeal of the State of California, Third Appellate District, from the following orders, judgment and decrees rendered in said action by the above entitled Court:

From the whole of the judgment in the said action rendered in favor of defendant, Southern Pacific Company and against plaintiff, Albert Eufrazia, and entered on January

26, 1953 in Book No. 119 of Judgments at page 197 of the Records of the Superior Court of California, in and for the County of Sacramento.

Dated: January 28, 1953.

(s) Thomas C. Perkins, Attorney for Plaintiff.

AFFIDAVIT OF MAILING (omitted in printing).

[fol. 1179] [File endorsement omitted]

[fol. 1180] IN SUPERIOR COURT OF SACRAMENTO COUNTY

NOTICE TO PREPARE CLERK'S TRANSCRIPT.—Filed Jan. 29, 1953

To the Clerk of the above entitled court:

Please take notice that the plaintiff, Albert Enfrazia, in the above entitled action, having appealed from the order and judgment in said case, as particularly designated in the Notice of Appeal on file herein, does hereby request that a Clerk's Transcript be made up and prepared in accordance with Rule 5 of Rules on Appeal, and does hereby designate the following papers or records on file or lodged with the Clerk, which said plaintiff desires incorporated in the record on appeal:

1. The Complaint on file herein.
2. The Answer on file herein.
3. Notice of Motion for Order to Proceed to trial on special defense before trial of any other issue on file herein.
4. The Order granting such motion on file herein.
5. The Judgment in favor of the defendant and against the plaintiff on file herein.
6. Findings of fact and conclusions of law.
7. Objection to findings of fact and conclusions of law.

8. All exhibits adduced at the trial of said action, (to be transmitted to the Clerk of the District Court of Appeal, Third Appellate District, in their original form);
9. Notice of Appeal;
10. Notice to prepare Clerk's Transcript;
11. Notice to prepare Reporter's Transcript;
[fol. 1181] 12. Written Opinion of Court.

(s) Thomas C. Perkins, Attorney for Plaintiff.

AFFIDAVIT OF MAILING (omitted in printing)

[File endorsement omitted]

[fol. 1182] IN SUPERIOR COURT OF SACRAMENTO COUNTY

NOTICE TO PREPARE REPORTER'S TRANSCRIPT.—Filed Jan. 29, 1953

To the Clerk of the above entitled court:

Please take notice that the plaintiff, Albert Eufrazia, in the above entitled action, having appealed from the Judgment in defendant's favor as particularly designated in the Notice of Appeal on file herein, does hereby request the preparation of a Reporter's Transcript of the oral proceedings in said action, of all of the testimony and evidence offered and received in said action, of all of the rulings and statements of the court, and of all objections and exceptions of counsel, all to be prepared pursuant to Rule 4 of the Rules on Appeal.

Dated: January 28, 1953.

(s) Thomas C. Perkins, Attorney for Plaintiff.

AFFIDAVIT OF MAILING (omitted in printing)

[fol. 1183] [File endorsement omitted]

[fols. 1184-1186] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 1187-1189] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SACRAMENTO

Department Number Three. Hon. Malcolm C. Glenn, Judge.

No. 90452

ALBERT EUFRAZIA, Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, A CORPORATION, Defendant

REPORTER'S TRANSCRIPT OF PROCEEDINGS HAD UPON HEARING—October 30, 1952

APPEARANCES

For Plaintiff: Thomas C. Perkins, Esq., 801 Ninth Street, Sacramento, California.

For Defendant: Horace B. Wulff, Esq., 1212 The 926 J Street Building, Sacramento, California.

[fol. 1190] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SACRAMENTO

Department Number Three. Hon. Malcolm C. Glenn, Judge.

No. 90452

ALBERT EUFRAZIA, Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, A CORPORATION, Defendant

Thursday, October 30, 1952

The hearing of the above entitled cause came on regularly for hearing on the above named date, before Hon. Malcolm

C. Glenn, Judge of said Court. The plaintiff was represented by Thomas C. Perkins, Esq., acting as his counsel. The defendant, Southern Pacific Company, was represented by Horace B. Wulff, Esq.

The following proceedings were had and the following testimony was taken, to wit:

The Court: Eufrazia vs. Southern Pacific Company.

Mr. Perkins: Ready for the plaintiff, your Honor.

Mr. Wulff: Ready, your Honor.

The Court: Well, in this matter apparently Mr. Wulff has the first move. There is a special motion before the Court. [fol. 1191] Mr. Wulff: I don't think so, your Honor. We made a motion originally under Section 597 to segregate the issues and try the issue of the jurisdiction of the court first, and if the plaintiff failed to prove that the Court has jurisdiction, then that would dispose of the case.

The Court: In other words, they are to open, is that right?

Mr. Wulff: They are to open, yes, because it is part of their case. We merely allege the plea of want of jurisdiction of the Court and I think the moving party is the plaintiff.

Mr. Perkins: I believe that is right, your Honor.

The Court: It is satisfactory with the Court. All right, proceed.

Mr. Perkins: I believe that is correct. Would your Honor care to have me outline the issues in the case?

The Court: No. I see that there are about four alleged causes of action, none of which states a cause of action in the Court's opinion.

Mr. Perkins: Well, the sole issue in this case is not the liability or the injury but simply the jurisdiction, as Mr. Wulff claims.

The Court: I understand this is a special hearing.

Mr. Wulff: This is to determine whether the action is under the Federal Employers Liability Act or whether it is under Workmen's Compensation. It depends on the question whether he was engaged in interstate commerce or [fol. 1192] whether he was engaged in manufacturing.

The Court: If he were engaged in interstate commerce he is entitled to bring the suit, is that correct?

Mr. Wulff: That is correct.

Mr. Perkins: I think that is only partly right, your Honor. If any of his work concerned interstate commerce he is under the Act under the late cases on the subject. There has been an amendment since 1949.

The Court: Let me point out here because we may be up against another proposition, I just want to point out in the complaint the cause of action in paragraph 4. It says, "That on or about—" and so forth—"the plaintiff was employed as a carman working on the defendant's railroad in the City of Sacramento—" and so forth—"that at said time and place and while acting in the regular course and scope of his duties, plaintiff was required to and was engaged in reaming holes in a car gondola with a reamer, that defendant was negligent in respect to and concerning said reaming, that due to and as a direct and proximate result of said negligence that the plaintiff was struck—" and so forth. Now, while you can plead negligence in general terms, and I will give you an illustration—you can see that this has no causal connection at all, it is merely a conclusion—you can see, for instance, in an automobile case that you could say that while operating the car the defendant so negligently drove and operated, and so forth, and that makes a causal connection between the negligence and the [fol. 1193] driving, and so forth, but here to say that the defendant was negligent without even attempting to state any of the facts, there is no cause of action, no causal connection. I have let this pass on more than one occasion where they say that the defendant is negligent and then they set forth some facts which is a poor and technically incorrect way of pleading. Nevertheless, we have let it pass because possibly on appeal the Court would think that that was near enough, but this has never passed.

Now, let's take the second cause of action. I am saying this because we may get into facts, you see, that are not even pleaded here as a causal connection. Now, we see in the second cause of action which is found in paragraph 2, after stating more or less the same matter, it says, "Plaintiff was required to and was engaged in reaming—" and so forth—"that defendant negligently failed to provide ade-

quate or sufficient men for said task." Well, that is a mere conclusion. You can't base a thing on a conclusion.

The next one is they failed to provide safe appliances and equipment to perform the work. None of them show any causal connection. They are all conclusions. However, let's go ahead.

Mr. Perkins: I think the issue at this time is this Federal issue.

The Court: I beg your pardon?

[fol. 1194] Mr. Perkins: Shall we proceed with our first witness, your Hon r?

The Court: On this special matter?

Mr. Perkins: All right. Will you take the stand?

The Court: But I am pointing out you have no cause of action in the Court's opinion on anything. Go ahead.

(Albert Eufrazia, Plaintiff herein, was thereupon called as a witness.)

Testimony of Albert Eufrazia, Plaintiff, witness produced in his own behalf, sworn.

Direct examination

By Thomas C. Perkins, Esq., counsel on behalf of the plaintiff herein:

Q. Will you state your name, sir?

A. Albert R. Eufrazia.

The Court: Is this the plaintiff?

Mr. Perkins: This the plaintiff, your Honor.

Q. And you are the plaintiff, are you not, in an action Albert Eufrazia vs. Southern Pacific Company?

A. Yes.

Q. And where do you live, Mr. Eufrazia?

A. I live on Route 3, Box 2050, Sacramento.

Q. And what is your occupation?

A. My occupation, working for the South Pacific as a carman.

Q. Were you hurt on the job on July 10, 1951?

A. Yes, I was hurt on July 10th.

[fol. 1195] Q. And that was while you were working for the Southern Pacific Company, is that true?

A. Yes.

Q. Now, when did you first start to work for the Southern Pacific Company?

A. I started in September, 1950.

Q. And that was in what place did you start to work?

A. Well, I started work for Mr. Fagan.

Q. You say you started to work for Mr. Fagan. Who is Mr. Fagan?

A. Well, he is in charge to the truck plant.

Q. Is he a foreman there?

A. Foreman.

Q. And what was your title or what did they call you when you started to work there?

A. Well, he put me on gondola ends, working on them.

Q. What did they call you down there?

A. A helper.

Q. You were a helper. And what kind of a helper were you?

A. Well, help on he set up the ends on gondolas.

The Court: Mr. Perkins, you are standing right in front of him. You speak in a loud voice. Stand back of the bar. There is plenty of room.

Mr. Perkins: Q. Is that what they call a carman's helper?

A. Yes.

Q. And then at that time Mr. Fagan was your foreman, is that right?

A. That is right.

Q. All right. Then where in the Southern Pacific Shops did you work at that time, what part of the shops?

[fol. 1196] A. Well, on the truck plant.

Q. Well, no, I am speaking of when you first went to work in September, 1950.

A. Yes.

Q. In what part of the shops were you employed?

A. Well,——

Q. Was that a conveyor?

A. On a conveyor.

Q. And what did they do on this conveyor?

A. Well, lift up ends and set them on top of that conveyor and putting bolts on them to ream some holes.

Q. And this was part of what sort of a program?

A. Yes.

Q. What sort of?

A. Well,——

The Court: What are you doing, going back to what time?

Mr. Perkins: That is when he started to work.

The Court: Well, we are not concerned with that. This is on or about the 10th day of July, 1951.

Mr. Perkins: Your Honor, under the late cases in this matter beginning with Wright against the Southern Pacific and also Lewis against the Southern Pacific as decided by the Supreme Court——

The Court: Just a minute. Give me them again. Wright vs. Southern Pacific, reference?

Mr. Perkins: It is Wright against the New York Central. That is 33 New York Supplement 2d 531 and also reported——

The Court: (Interposing) 33 New York Supplement 2d?

Mr. Perkins: 531.

[fol. 1197] The Court: 531.

Mr. Perkins: Affirmed by the Supreme Court of New York, reported in 43 Northeastern 2d.

The Court: I don't care about that.

Mr. Perkins: And then certiorari denied by the United States Supreme Court.

The Court: Tell me what it says.

Mr. Perkins: In that case it is said that the issue is not necessarily what the man was doing at the moment he was hurt but what any of his duties consisted of. In that case it was a boilermaker and he was hurt while doing intrastate work; however, he had done interstate work, and they held that under the 1939 amendment to the Federal Employers Liability Act that this man was covered. Now, that has been followed——

The Court: I know, Mr. Perkins, but this goes back, according to the testimony, this gentleman started to work—what date was that?

A. September.

The Court: 1950?

A. 1950.

The Court: The accident happened on July, 1951. So, that would be about nine months afterward and I don't think your case there has any bearing.

Mr. Wulff: If your Honor please, I am entirely in accord with that. I agree with the Court definitely on that and I can explain it, I think.

Mr. Perkins: Your Honor, may I continue further on this?

[fol. 1198] The Court: You have not told me the time difference you see.

Mr. Perkins: Well, at some time, oh, about a week before that he had done something interstate.

The Court: I know, but this is nine months.

Mr. Perkins: Well, according to that——

The Court: Let's see what Mr. Wulff has on the other side.

Mr. Wulff: If your Honor please, we are concerned with a man's job, the job he held on the day of his injury. Now, if that job required him to do some work in interstate commerce and some in intrastate commerce or some in no commerce at all, like manufacturing, why, he would be within the Federal Employers Liability Act. He needn't at the moment of the injury be engaged in interstate commerce, but it depends on the duties of the job he held on the day he was injured. This man starts out way back in September, 1950 as a helper, later on in March, 1951, as the evidence will develop he was employed as a carman, a different job entirely, and then he was assigned this job and that job and this job and that job, and finally he landed in June on the job on which he was injured. Now, the question is what were the duties of this man on the job he held on July 10, 1951. Now, if he had duties then in interstate commerce or in intrastate commerce or both, it would be immaterial so long as he did some in interstate commerce, but we needn't go back and show what his duties were on seven or eight other jobs he held prior to

the job he had held at the time of his injury. It would [fol. 1199] be a waste of time and the Court's time.

Mr. Perkins: If the Court please, what I am asking to do is to show what his job was.

The Court: I know, but, Mr. Perkins, that argument is unanswerable. We could take all day here showing all the different jobs he did and it would not have any bearing on it. You have got to be logical in this matter. The objection is sustained.

Mr. Perkins: All right.

The Court: Let's get down to what his job was at the time that he was injured. It might be it might go a day or so before or sometime before, but what his job was at that time.

Mr. Perkins: All right.

The Court: And we will rule on it.

Mr. Perkins: Let's start there and work back.

Q. Now, what was your rate at the time you were injured on July 10, 1951?

A. Well, I don't remember right at the moment.

Q. Well, were you an upgraded man at that time?

A. In March?

Q. Well, no, I am talking about July 10, 1951, the day you were hurt; what was your classification with the Southern Pacific Company at that time?

A. Well, I don't remember right at the moment.

Mr. Perkins: Well,——

[fol. 1200] Mr. Wulff: Stipulate he was a carman.

Mr. Perkins: It has been stipulated he was an upgraded carman. All right.

Mr. Wulff: That is he was a carman.

Mr. Perkins: We both agree he was an upgraded carman.

Q. Who was your foreman at that time?

A. After I was upgraded, Mr. Frank Miller.

Mr. Wulff: I object to it. The answer is not responsive. I don't believe the witness understood the question. You asked him at the time of his injury.

Mr. Perkins: Q. At the time that you were hurt?

A. Well, it was Mr. Fagan.

Q. Mr. Fagan was your foreman, is that right?

A. Yes.

Q. And what part of the shops were you working in when you were injured?

A. Well, I was working on gondola ends.

Q. You were working on gondola ends?

A. Yes.

Q. And they were on a conveyor, were they?

A. Yes, they were on a conveybr.

Q. And there were other men assisting you in this operation?

A. Yes, there was two other men with me.

Q. And as an upgraded carman were you ever called on to do any other jobs?

Mr. Wulff: Just a minute. If your Honor please, I object to that because it is ambiguous.

The Court: The objection is sustained. That might go [fol. 1201] back to the first time he was ever employed.

Mr. Wulff: That is right. We are concerned with the job he had at the time of his injury.

Mr. Perkins: Well, I submit, your Honor——

The Court: Let's not argue it. Your question was, "Were you ever called upon to do any other jobs." The Court says——

Mr. Perkins: As an upgraded carman.

The Court: It didn't say that.

Mr. Perkins: May I rephrase the question and make it that way?

The Court: Let's not argue these things if they are too apparent. Let's go forward in accordance with the Court's ruling. I am getting tired of these arguments.

Mr. Perkins: Q. As an upgraded carman were you ever called on to do——

Mr. Wulff: (Interposing) Just a minute.

The Court: That is the same thing. When?

Mr. Perkins: Well, all right.

Q. From the time you were first upgraded——

The Court: When?

Mr. Perkins: Q. When were you first upgraded?

A. In March, 1951.

Q. You were upgraded in March and you had the same position at the time you were injured, is that correct, as an upgraded carman?

A. No, after I was upgraded I went to work for Mr. [fol. 1202] Frank Miller.

Q. And what were you doing for him?

Mr. Wulff: Just a minute. If your Honor please, I think we can shorten this to beat the band. There is no question about the fact of the matter when this man was upgraded to carman he was given various jobs, some jobs on the repair of old cars, some jobs of conversion to box-cars and under a different foreman in each instance, and finally in June, 1951 he was first assigned permanently to the new car construction. Now, each one of those jobs is a new job, each one has different duties than the other. Now, I think Mr. Perkins must be confined to the job he held, I don't care whether he was a carman or not, because carmen will perform a lot of jobs, a lot of assignments. He had a definite assignment the date of his injury. That is the assignment we are concerned with and his duties then. To go back and take each job we would be here for weeks.

The Court: Well, Mr. Perkins, why don't you ask this gentleman here what he was doing on that day. Let's see if we can't get down to something concrete. You have alleged that in your complaint.

Mr. Perkins: All right, your Honor.

Q. What were you doing on the day that you were hurt, what was your job then?

A. Well, my job was to set up ends on that conveyor and reaming holes.

[fol. 1203] The Court: To set up what?

A. Gondola ends.

Mr. Perkins: Q. All right.

A. Yes.

Mr. Wulff: Set up ends on gondola cars, your Honor, is what he means, ends of gondola cars.

The Court: Just a minute. I will handle this thing.

Mr. Wulff: Very well.

The Court: The trouble is that I have a loud speaker and when I talk to you gentlemen I turn it on and I have to push it down here when I talk to him.

A. Well, I was setting up gondola ends on a conveyor and reaming.

The Court: How do you mean setting up ends?

A. Well, there is ends for gondola cars.

The Court: I see.

A. And we were reaming holes.

The Court: You were reaming holes?

A. Yes, making them large so the rivets will work out better.

The Court: All right.

Mr. Perkins: All right. If you will stipulate that he was doing running repairs——

The Court: You don't have to ask for any stipulation.

Mr. Perkins: Q. Were you ever called on to do any running repairs as an upgraded carman——

Mr. Wulff: (Interposing) Now, I object.

[fol. 1204] Mr. Perkins: Q. (Continuing) —on that job?

Mr. Wulff: Let's refer now to the job he was working on the new production line, working under Fagan on July 10th.

The Court: Just a minute. The Court has already asked Mr. Perkins to go over with this gentleman just what he was doing at that time and on that day. Let's try to see if we can't go forward without all these interruptions, and if you will follow the Court's instructions we won't have any trouble, but to let him testify momentarily as to one thing and then start him off on something else that may have no connection with it, we do not get anywhere and neither the attorneys nor the Court can follow this kind of a proceeding unless you get down to what is happening.

Mr. Perkins: May I state my offer, your Honor?

The Court: I do not care about stating that. Let's go ahead and forward. Your position will develop later. I know what you have set forth in your complaint, and let's see just exactly what he was doing at that time. Then if you want to digress somewhat, why, we will have to take that up later, I suppose.

Mr. Perkins: Q. So, at the time that you were hurt you were what is known as an upgraded carman and you were reaming holes in these gondola ends, is that correct?

A. That is right.

Q. And wha program was that, do you know what kind of a program that was?

[fol. 1205] A. Well, I don't remember exactly, but from my memory 2816, 2816 program.

Q. The 2816 program. And do you know what sort of a program that is; that is new car construction, is that correct?

A. That is right.

Q. Yes.

Mr. Perkins: Well, I think that we are both agreed as to that.

The Court: Oh, never mind.

Mr. Perkins: The very holes he happened to be reaming at that time.

The Court: Never mind what you are agreed to, because that is not evidence. Proceed with the examination of this witness, please.

Mr. Perkins: Q. Now, were these new ends?

A. Yes.

Q. Were any of them old ends?

A. No, just new.

Q. All right.

The Court: What is the end, a new end, is that a separate piece of metal or something?

A. Yes, it is a piece that sets on the end of the cars.

The Court: I see. Do those come to the men by a conveyor?

A. Well, we have a hoist and we lift it up and set it on the conveyor.

The Court: You set it on the conveyor, on the gondola on the end?

A. Set the ends on the conveyor so we can work on [fol. 1206] them.

The Court: On a conveyance?

A. Yes.

The Court: How big are those ends and what are they?

A. Well, I wouldn't know how big.

The Court: Well, you can illustrate some way so I can get some idea.

A. Well, they are pretty large, but I wouldn't know how big.

Mr. Perkins: They go on gondola cars.

The Court: Just a minute. When the Court is examining, please don't interrupt. Well, what I am trying to get at is the modus operandi to get these ends——

A. (Interposing) Air hoist.

The Court: By what?

A. Air hoist, a machinery to lift it up with an air hoist.

The Court: To lift the machinery up?

A. The machine got two hooks, lift up the ends and set them on the conveyor.

The Court: On a conveyor so you can work on them, is that it?

A. That is right.

The Court: And while you are working on this conveyor, on these ends, is that when the accident happened?

A. Yes.

The Court: And you had not tried to place them on the gondola yet?

A. No.

The Court: But they do belong on there when you get finished?

A. Yes, sir.

[fol. 1207] The Court: You were reaming holes?

A. Holes.

The Court: For the purpose of putting bolts in?

A. Rivets.

The Court: Rivets. And was the reamer operated by compressed air or something like that?

A. Compressed air.

The Court: And you were running one of them?

A. Well, yes.

The Court: What?

A. Yes.

The Court: Well, it is similar to this compressed air machine that they use on the streets to dig holes, something like that?

A. Yes.

The Court: But, of course, the reamer is hard steel?

A. That is right.

The Court: And you bore these holes?

A. That is right.

The Court: And how high is that from the ground that you are working on?

A. Well, anywhere—I think it was about two or three feet from the ground.

The Court: So you were standing on the floor?

A. No, standing on top of the ends.

The Court: Standing on top of the ends of what?

A. These ends was laying flat. We were standing on the top working with machines in our hands.

The Court: Oh, I see. You are standing on the ends themselves that you were boring the holes in?

A. Yes, they was laying down and we was standing on [fol. 1208] top.

The Court: I see. Well, you had a place to stand?

A. That is right.

The Court: A flat place?

A. Yes, sir.

The Court: All right.

Mr. Perkins: Q. How long had you been on this particular task of reaming the holes?

A. Well, I had been there about two months after setup.

Q. Well, when did you start to work on this task of reaming holes; wasn't that about three weeks?

A. Yes, about three weeks after we got set up.

Q. All right then. So, about three weeks before you were hurt you had the task of reaming holes?

A. That is right.

Q. All right. What did you do before that?

Mr. Wulff: Well, Tom, I think you have led the witness and I have permitted it. I am perfectly happy to stipulate he started that on June 13. Isn't that the date?

Mr. Perkins: I think that is pretty close.

Mr. Wulff: I don't think it was three weeks. It is over three weeks, June 13, and he was injured on the 10th.

The Court: I can't understand just what you gentlemen are talking about. Do you want a stipulation?

Mr. Wulff: Yes. I think, if your Honor please, he was assigned to the new car production under Foreman Fagan on June 13, 1951 and as he testified he was injured on [fol. 1209] that job on July 10.

Mr. Perkins: I won't stipulate to that because it is not the case.

Mr. Wulff: All right.

Mr. Perkins: In other words, he got the task of reaming these holes as of that date, but he was being——

The Court: (Interposing) If you don't agree with it, why, then question the witness.

Mr. Perkins: Q. So for approximately three weeks before you were hurt you were reaming the holes, is that correct?

A. Yes.

Mr. Wulff: I don't want to object. I want the proceedings to go quickly, but he is just putting words in his mouth. He said two months and you said three weeks. I don't think it is fair to put words in the witness' mouth.

Mr. Perkins: Q. It would be around June 15 that you commenced on the task of reaming the holes?

A. That is right.

Q. What was your task before that?

A. Well, I was working for Mr. Frank Miller.

Q. All right. Then would you do running repairs on that task?

A. Yes.

Mr. Wulff: If your Honor please, I object to that and move it be stricken out. It is a different job entirely, different foreman, different work. What he did on that job we are not concerned with. I move to strike it out.

[fol. 1210] The Court: Objection sustained. Strike it out.

Mr. Perkins: Q. Were you subject to being changed around from time to time from one foreman to the other?

The Court: Without an objection the Court rules that is out of order.

Mr. Perkins: Well, if it please the Court——

The Court: (Interposing) I don't want any argument on it. It is too plain. I am not going to sit here and argue things that are self-evident.

Mr. Perkins: All right.

Q. Now, how long had you worked on this job or rather on those tasks for Frank Miller?

Mr. Wulff: I object to that.

The Court: The same subject matter.

Mr. Perkins: All right.

Q. Had you started on reaming these holes for a short time and did you stay on reaming the holes for a short time and then were you replaced before you went on it for three weeks?

The Court: Just a minute, Counsel.

Mr. Wulff: Same objection.

The Court: This is your witness and you know the rule as well as anybody, as well as the Court. When it is your witness you cannot lead, you cannot lead him by direct questions. On cross-examination the rule, of course, is different, but he is your witness and he is the one to tell you and the Court and anybody else who wants to know about it, and to start in leading him the way you [fol. 1211] are doing is all out of line.

Mr. Perkins: Your Honor,——

The Court: (Interposing) There is no argument. There is no argument.

Mr. Perkins: This man has a language difficulty. He has difficulty with the English language.

The Court: Oh, well, we will get to that when that appears. Don't make these kind of remarks. They don't mean a thing in the world and you know it. Let's go at this just like we ordinarily do, Mr. Perkins.

Mr. Perkins: All right.

Q. Tell us what led up to your getting onto this task of reaming the holes?

Mr. Wulff: That is immaterial, your Honor.

The Court: Objection sustained. Here is a job he has held since apparently June sometime.

Mr. Perkins: Well no, your Honor, he was an upgraded carman since March and they can be assigned any place.

The Court: I know, but we have passed on that. This particular job he is doing, he held it since, I think you agreed, sometime in June.

Mr. Perkins: No, I do not agree. I said that task he was doing, but they could take him right off of there and put him fixing a journal box.

The Court: We are concerned with what he was doing [fol. 1212] at the time of the accident, that is his job.

Mr. Wulff: The job he held at that time.

The Court: Well, I am not going to argue it any more. That is too plain to argue now. If you don't proceed we will let this gentleman go and take another witness. We have taken now pretty nearly an hour and we haven't gotten anywhere.

Mr. Perkins: Q. When you are upgraded to a carman, does that mean that you are qualified to do any task as a carman?

A. Yes.

Q. All right. Then the carman's jobs concern what is known as running repairs?

Mr. Wulff: Just a minute. Object to that.

The Court: Objection sustained. I am going to shut off further examination unless you get to the point.

Mr. Perkins: Your Honor, I feel that that is very important.

The Court: I can't help what you feel.

Mr. Perkins: I have got these cases well briefed.

The Court: I don't care what you figure. The Court has ruled. We can't run a court by what either counsel feels. I try to run it according to the decisions and common sense.

Mr. Perkins: Well, what I was relying on was these very late Supreme Court California cases such as Erickson against the Southern Pacific that was decided about a month ago.

Mr. Wulff: That is not final. There is a certiorari filed on that.

[fol. 1213] Mr. Perkins: And also Lewis against the Southern Pacific which is final, and that is a Supreme Court case.

Mr. Wulff: That is final.

The Court: Let's get it and settle it if you think that is true. I will find it. Just give them to me.

Mr. Perkins: We have Lewis against the Industrial Accident Commission in 19 Cal. 2d page 284.

The Court: I am not sure that an Industrial Accident case decision would be apropos to what we have here.

Mr. Wulff: That was a decision by the Supreme Court of California.

The Court: Yes, I know, but it involved——

Mr. Wulff: (Interposing) It involved whether he was in interstate commerce, your Honor, but does not involve this situation, but the Court may read the case: I don't think it is pertinent at all.

The Court: Well, just a minute. Let's get it. We will look at it. What is the reference?

Mr. Perkins: That is 19 Cal. 2d 284, and then there is a whole string of cases just following that.

The Court: I don't want a string of cases. I can't read them all. I will try to read this one here which you say is in point.

Mr. Perkins: Yes, sir. There is also another good, very good one.

The Court: One will be enough.

[fol. 1214] Mr. Perkins: All right.

The Court: 19 Cal. 2d 284.

(Intermission).

The Court: The Court is looking at the case of Lewis vs. Industrial Accident Commission, 19 Cal. 2d 284. In this case the plaintiff was a switchman and at the particular moment he wasn't engaged in that particular job, as I gather from it, but they say this:

> "The Federal statute has been severely criticized, in large part because of the difficulty in ascertaining in a particular situation whether at the moment of the injury the employee was actually engaged in interstate transportation. In 1939 an amendment to Section 1 of the Federal Employers' Liability Act as enacted which reads: 'Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this act, be considered as being employed

by such carrier in such commerce and shall be considered as entitled to the benefits of this Act—' "

Now the Court says further:

"One of the main reasons for thus amending the [fol. 1215] statute was to eliminate the necessity for establishing that at the moment of his injury the employee was actually engaged in the movement of interstate traffic.

"In order to effectuate the purposes of the amended Federal statute and to avoid the hardship involved in determining in each case whether the Federal or State remedy is to be applied, all doubts should be resolved in favor of the Federal jurisdiction."

Now, this is the important part:

"In any event, petitioner's duty as a member of the switching crew on an interstate railroad seems to us to affect interstate commerce directly or closely and substantially, even though at the moment of his injury he was not engaged in the movement of interstate traffic."

Now, you will see that that part connects with the above statement, "One of the main reasons for thus amending the statute was to eliminate the necessity for establishing that at the moment of the injury he was actually engaged—" and the language of the statute, "any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate commerce or shall in any way directly or closely and substantially affect such commerce—". Now, there is your key to the whole situation. It ought to be plain enough.

[fol. 1216] Mr. Perkins: Well then will your Honor permit the question of what he was doing in his job as a carman's helper when he wasn't reaming?

Mr. Wulff: No.

The Court: No.

Mr. Perkins: I mean, there is no——

The Court: (Interposing) Where is the case that you

referred me to, a switchman, and we all know that switchmen are engaged in interstate commerce work.

Mr. Perkins: There are three along the same line involving carmen's helpers. There is Southern Pacific vs. I. A. C., 19 Cal. 2d 271, involving a carman.

Mr. Wulff: He was repairing a car, I know that.

The Court: Just a minute. What is the page on that?

Mr. Perkins: 271.

The Court: 271.

Mr. Perkins: There was a man that was——

The Court: Wait until I look at it. I won't take your word for it.

Mr. Wulff: What is the name of that case?

Mr. Perkins: Southern Pacific vs. I. A. C.

Mr. Wulff: That is right.

The Court: Let's see what this says. Well, the first syllabus says, "Where a car repair man at the time of his injury was repairing a 'combination truck and boom car' designed to clear tracks on which a railroad company engaged in interstate commerce operated its trains, his [fol. 1217] remedy is not under Labor Code,—" and so forth—"but under the Federal."

You see, they have included that because of the fact that this particular work of this car was to clear tracks for interstate commerce.

Mr. Perkins: Then, your Honor, there is a very good article in 10 A. L. R. 2d 1280 that explains this moment of the injury rule, citing a leading case of Moxey against the Gulf & Missouri Railroad, Supreme Court of Missouri case, and in that one they set out this moment of injury rule not applying.

The Court: Well, the two cases that you have given me in California are not applicable.

Mr. Perkins: Well, all right, your Honor. There is another one, Southern Pacific vs. I. A. C. 88 Cal. App. 569 and also another carman's helper.

The Court: Well, just a minute. We will take them and look at them.

Mr. Wulff: That is not pertinent.

Mr. Perkins: 88 Cal. App. 569.

Mr. Wulff: If your Honor please, may I make a statement to clarify this matter here?

The Court: Well, you can't clarify anything for Mr. Perkins because he won't take it, but I will look at his cases.

Mr. Wulff: Very well, your Honor.

The Court: He comes back with another immaterial answer.

Mr. Wulff: Can I get that one for you?

[fol. 1218] The Court: No, I know where they are in my department. 88 Cal. 2d?

Mr. Perkins: 88 California App. 2d.

The Court: Cal. Appellate 2d.

Well, Mr. Perkins, this case is along the lines that the Court expected and was going to examine this gentleman, which I think you should have employed long ago, and that is the question, if you will read this case, and it is a gondola case, of finding out something about these gondolas, particularly the one he was on and others, because that is the question that determines the matter and we have been here all morning and we haven't even gotten to that most important part of the whole case, and this case here is a gondola case.

Mr. Perkins: All right.

Mr. Wulff: If your Honor please, in that case it is an old repair case and this man is building new cars.

The Court: Well, I don't know. We will have to find out. That is the important part of this case.

Mr. Perkins: Q. Now, Mr. Eufrazia, do you know where these gondolas came from, these ends of the gondolas came from before they reached you?

Mr. Wulff: We have no concern with that at all, if your Honor please.

The Court: No. Please get on the main track that the Court just directed you to do and which is involved in this case that you cited.

[fol. 1219] Mr. Perkins: Well, as I understand your Honor's point, it is that you want to find out where these ends came from and where they went.

The Court: Not particularly the ends. We want to know about these gondolas. Was this gondola a new one that they were building?

A. Yes, it was a new one.

The Court. What are the gondolas like, what are they, a flatcar?

A. Well, they are flat and we lay them on top of the conveyor there so we can work on them.

The Court: Are they like a flatcar?

A. Yes.

The Court: This was one that was being built in the shops?

A. Well, I don't know where they build them at.

The Court: You didn't know?

A. No.

The Court: Well, when you were working on it there it had been undoubtedly brought in over the tracks, had it; how was it brought in there?

A. A crane brings them in to a position there.

Mr. Wulff: Well, if your Honor please, the answer is not responsive to the Court.

The Court: I would like to know just what the gondola is.

Mr. Wulff: The Court has in mind the car. He is testifying as to the ends. This is a new car production, if your Honor please, new car production line. The railroad is building at this time eighteen new gondola cars a [fol. 1220] day.

The Court: What are gondola cars?

Mr. Wulff: A gondola car is a high sided car, open top, with double doors on the bottom that hold rock and things like that and then they drop them.

The Court: That is what a gondola is?

Mr. Wulff: I believe this is new car production, if your Honor please.

The Court: Well, let's get from the witness what it is.

Mr. Wulff: All right, fine.

The Court: Now, as far as you know had this gondola been built right where it was there?

A. No, we just reaming holes and pass them to another.

The Court: I am talking about your work now. I am talking about—you talk into that microphone and I will hear you. What I am asking you is, was this gondola built there where you were working, do you know that?

A. No.

The Court: How did it get into the place where you were working?

A. Well, as—they build it—they bring it in. They bring it in with a crane.

Mr. Wulff: If your Honor please, may I object to this? The witness does not understand the Court's questions. The Court was questioning him relative to this gondola car. This is not a car when he is working on it at all. He doesn't know where the ends come from and I don't think it is material where the wheels come from, where all [fol. 1221] the nuts come from. That doesn't make it interstate commerce.

The Court: I didn't ask him anything about that.

Mr. Wulff: But he is answering about that, your Honor.

The Court: Well, I can't help what he answers.

Mr. Wulff: There is no car at the time he is working on it, there is no car.

The Court: This gondola was a car; was it a car?

Mr. Wulff: No, it is just a piece of—the end of—just two ends they call A and B.

The Court: Can't you withdraw this gentleman and put somebody on that can testify to this?

Mr. Perkins: I have one.

The Court: You can go back.

Mr. Perkins: I have an exhibit here that may clarify it, the time card of the time the day he was hurt.

The Court: I don't care anything about that. Withdraw him temporarily and get somebody who can tell us.

Mr. Perkins: Mr. McElroy, will you take the stand?

(Raymond McElroy was thereupon called as a witness on behalf of the plaintiff herein.)

Testimony of RAYMOND McELROY, witness produced on behalf of the plaintiff herein, sworn.

Direct examination

By Thomas C. Perkins, Esq., counsel on behalf [fol. 1222] of the plaintiff herein:

Q. Will you state your name to the Court?
A. Raymond McElroy.
Q. And where do you live, Mr. McElroy?
A. 1616 Pennsylvania Avenue, West Sacramento.
Q. And what is your occupation, sir?
A. Railway carman.
Q. Now, how long have you been employed by the Southern Pacific Company?
A. Yes.
Q. When did you start to work for the Southern Pacific Company?
A. July 1, 1937.
Q. Now, you stated that you are a carman?
A. That is right.
Q. What is that?
A. Well, anyone who builds, repairs railway cars.
Q. All right. Now, what would an upgraded carman's helper, Mr. McElroy, be?

Mr. Wulff: That has been objected to. Eufrazia has already testified that.

The Court: We have called this gentleman at the Court's request to find out what was being done at the time of the accident, what a gondola was and things like that. Will you kindly question him about that?

Mr. Perkins: I will.

Q. Are you familiar with car shop 9 in which Mr. Eufrazia was working?
A. I am.
[fol. 1223] Q. And are you familiar with the conveyor on which Mr. Eufrazia was working?
A. Yes.
Q. Are you familiar with what he was doing on July 10, 1951 in the gondola program?

Mr. Wulff: Just a minute. Just a minute. If he knows of his own knowledge.

The Court: He wasn't there, how could he testify?

Mr. Wulff: Was he there?

Mr. Perkins: Yes.

Mr. Wulff: Did he witness the accident?

Mr. Perkins: No, he did not, but he knows what the program is.

The Court: Oh, well, were you there at the time of the accident?

A. I was the local chairman in the Sacramento shops at the time the man was hurt, your Honor.

The Court: I say, were you at the scene of the accident when he was hurt?

A. I wasn't at the scene at the time the man was hurt. That would have been impossible.

The Court: Well, let me ask a few questions. Will you tell us about what you know, not particularly from him, but what the gondola is and what was generally the work in regard to those matters?

A. The gondola is a coal car, built for the purpose of hauling coal or other materials similar to coal, known as a gondola. It actually is a coal car.

[fol. 1224] The Court: Now, let me ask you this, at the time of the accident do you know or were you around there either before or after so as to know what was being done at that time?

A. Oh, yes, I have been in and out of there, over in that area many times.

The Court: I mean at this particular time. We are trying to find out something about this particular time.

A. It is possible, your Honor, that I could have been down in that shop.

The Court: You can't recall it?

A. Sir?

The Court: You can't recall, you don't know just what he was doing or can't recall?

A. I know that he was riveting the ends of these gondolas together. They come in sections.

Mr. Wulff: If your Honor please, I move that that is pure hearsay.

The Court: Strike it out. What I am trying to find out generally is this: This other witness couldn't tell us. Do you know from your own knowledge whether this gondola was being built—I am not asking for hearsay—being built there at the particular place where it was or whether it had been moved in or anything like that?

A. The parts that this man was working on were being assembled right there. Is that what you mean?

The Court: Do you know that of your own knowledge? [fol. 1225] A. Yes, I do.

The Court: Well now, what parts were being assembled that you know of, of your own knowledge?

A. The ends of these gondolas were being assembled to put on the rest of the car. The cars were built in the car shop 9.

The Court: But you don't know whether there was any gondola that had been built right there at this time, do you?

A. Yes, there were gondolas that had been built.

The Court: I mean the one that he was about to put the ends on or somebody was, was there a gondola all completed there that you know of, of your own knowledge?

A. Yes, there were gondolas that were completed at the time he was putting these ends on.

The Court: That is completed?

A. You see, your Honor, if I might state——

The Court: Would you explain it?

A. These cars are built in the shop, the car shop 9, and all of these men work on those cars. This man in particular was working on the parts of that car and after it

was assembled and put together, then it was placed on a car and taken over to this line where they were building these cars.

The Court: Well, I am not getting much out of that.

Mr. Wulff: That is a correct statement.

The Court: What is that?

Mr. Wulff: That is what they were doing, a production line, building cars.

[fol. 1226] The Court: The witness is correct?

A. This production line is a part of car shop 9, not separate.

Mr. Wulff: I object to that as voluntary and a conclusion of the witness. It is separate and distinct in itself.

The Court: Strike it out. Go ahead, Mr. Perkins.

Mr. Perkins: All right.

Q. Do you know if any of these parts used in this gondola program were used or were they all new parts?

A. They were all new parts.

Q. And then would these gondolas go out into the train service, that is be used in interstate commerce for hauling?

Mr. Wulff: I don't think this witness has any idea. He is not in management at all, if your Honor please. He is merely a carman. It is all hearsay with him. He would have no access to any knowledge at all as to how these cars were shipped out or whether they are shipped out.

The Court: Objection sustained.

Mr. Wulff: We have witnesses to prove all that if you wish that proof.

Mr. Perkins: Q. Now, when a man is assigned to this assembly line, does that mean that that is his job or does he get switched around to other things?

Mr. Wulff: Just a minute.

The Court: Just a minute.

Mr. Wulff: Not qualified as an expert. It is a pure conclusion.

[fol. 1227] The Court: You would have to qualify him first.

Mr. Perkins: All right, your Honor.

Q. How long have you worked in car shop 9?

A. That would be hard to determine because car shop 9 is a part of the Car Department in the Southern Pacific General Shops in Sacramento and I have worked in all of the shops since 1937.

Q. Have you ever worked in car shop #9?

A. I have.

Q. And how long have you worked in car shop 9?

A. That would be hard to determine because as soon as I had an opportunity I bid out of that car shop 9, which each man can do, and went in the passenger car department due to the fact that it paid more money.

Q. And how do you bid out, what do you mean by bidding out?

A. By placing a request on a job that is bulletined on the board.

Q. And can you request a job involving running repairs?

A. A job on running repairs is only a part of the freight car department.

Q. And you personally know and have observed the men working on the conveyor where Mr. Eufrazia was working?

The Court: Just a minute. Are you testifying as a witness? You haven't been sworn.

Mr. Perkins: Oh, I am sorry.

Q. Have you ever seen the men working on a conveyor?

A. Yes, I have.

[fol. 1228] Q. Do you know of your own knowledge if that is the same conveyor that Mr. Eufrazia was employed on at the time he was hurt?

A. I saw Mr. Eufrazia working on that conveyor.

Q. All right. And of your own personal observation and knowledge have you seen people go from there to running repairs and vice versa?

Mr. Wulff: Just a minute. If your Honor please, I object to that. In other words, he said he has seen a man transferred from one job to another job. Unless he knows the reason for the transfer, I have got to go in and prove every individual transfer. There are many reasons why a

man is transferred. These men are assigned to permanent jobs, but they may be re-assigned upon certain contingencies that may arise, and unless he knows the contingency doesn't mean anything. I object to throwing into the issues of this case every transfer, pulling out of the time cards or every man that he testifies to.

The Court: I don't know what the object of asking about the transfer is.

Mr. Perkins: Well, my object is this, your Honor, that we will show that a carman is the same as a switchman or anything else and the fact that that man's task at the time he was hurt was reaming an end doesn't necessarily mean that is his entire job, that it is just like a switchman that might be in a yard one week and then the next week he might be in another part of the yard or a brakeman on another day.

[fol. 1229] The Court: What transfer are you talking about, when?

Mr. Perkins: Well, I would show that it is just a general rule; I mean, in other words, that working on this assembly line that he was working on is just part of his job in working for the S. P. as a carman.

The Court: Well now, is it your point that he was engaged in interstate commerce because he was working on the assembly line, is that what you are trying to show, or because gondolas when finished were going to be on interstate commerce, or what is your point?

Mr. Perkins: I am trying to show what his job was; I mean, in other words, what he was hired for by the Southern Pacific; that they hired him to do all manner of tasks, not just to ream an end or to do any one thing specifically, any more than they hire a switchman just to throw one switch or to work on one set of switches; that they can transfer them all around.

The Court: Let's get down to the specific point that you want to ask him about, when and where it was and what the transfer was that you are going to refer to before we rule on it.

Mr. Wulff: Unless the reasons are there, it doesn't mean anything.

The Court: It isn't a question of reasoning that counsel

is working on, it is a question of trying to prove whether or not he was engaged in something that we call interstate commerce. They might transfer him because he [fol. 1230] wasn't doing a good job or something.

Mr. Wulff: I have no objection to finding out what the man's duties are on the job he was employed on at the time he was injured. That is a pertinent question.

The Court: That is what I am trying to find out.

Mr. Perkins: Q. What would be Mr. Eufrazia's job as an upgraded carman on July 10, 1951, if you know from your own observation?

Mr. Wulff: Just a minute. I submit this man is not qualified. He is merely a carman himself. He is not even a foreman. He has no connection with management, he has no connection, he wasn't present when Mr. Eufrazia was instructed as to what to do as to his duties, he has no qualifications. In other words, we can call some other carman on the stand to testify to something else, that they don't know. It is all hearsay with them.

The Court: Mr. Perkins, you would either have to prove by foundation this gentleman by observation and training, and so forth, has qualified to tell what kind of a job that is. Now, it seems to me that you are taking a long time in trying to get down to the point that we are concerned with. I don't care how long we take, but I would like to do it as expeditiously as we can.

Mr. Perkins: Well, your Honor, shall I develop this man's background?

The Court: I would like to know the foundation.

[fol. 1231] Mr. Perkins: Q. How long have you worked for railroads?

A. Thirty-three years.

Q. You worked for railroads for thirty-three years, and in what capacity have you worked?

A. As a railway carman.

Q. You have been a railway carman for thirty-three years. Now, are you familiar with the duties of a railway carman?

A. I am.

Q. And you have done those duties yourself?

A. I have done every bit of them.

Q. And you have received orders from the company and performed these tasks?

The Court: Just a minute.

A. That is correct.

The Court: Counsel, I am not going to sit here and listen to this time and time again. I have told you not to lead the witness. I realize that some of these may be more or less preliminary, but we can't take your testimony in leading. We have to take it from the witness on direct examination. Now, how many times do I have to tell you that?

Mr. Perkins: Q. Well, tell us what the duties of a railroad carman are?

The Court: Oh, I am going to take this examination away from you and ask myself. Let me ask you this, over your course of years with the railroad, have you—I don't know just what counsel is trying to prove, but I will take first the matter of conveyancing or conveyors, or whatever they are. [fol. 1232] First tell us what those are? In other words, he is working on an end, isn't he, some piece of metal, big machinery?

A. It is an end of a gondola or a coal car. He is building that, assembling that end.

The Court: He is working on that?

A. Yes.

The Court: Now, in order to try to find out what I think counsel is trying to. We have talked about a conveyor to get those ends in place.

A. I would refer to it also as a table or a bench where these fellows work on these parts.

The Court: I am talking about this particular piece of metal or this end, getting it in place. Where does it come from?

A. Well, those ends are purchased in two parts.

The Court: I don't mean how they are purchased. How do they get at the particular place where they are? They are not carried there by hand.

A. They unload them off of cars and set them there in two pieces and then they rivet those together.

The Court: They are unloaded from cars, from trains?

A. That is right.

The Court: And they are unloaded by means of cranes?

A. That is right.

The Court: And the crane puts them in place?

A. And a carman operates that same crane. This man [fol. 1233] here would be subject to operate that crane.

The Court: I don't want any voluntary statement please. So these ends are placed there by cranes which take them from some car, is that it?

A. That is right.

The Court: Brought in by car, and you have seen that, I presume from your experience and observations?

A. That is correct.

The Court: You know that is the way it is done, is that it?

A. That is right.

The Court: Now, what else do you want to know?

Mr. Perkins: I want to know if that would be the only thing that this man is subject to being required to do.

The Court: Well now, just a minute. That is another story. We are trying to question him on facts that are in his knowledge.

Mr. Perkins: Well, I think that would be in his knowledge.

The Court: Well, you haven't laid any foundation for that.

Mr. Perkins: All right.

Q. Have you yourself been ordered to do one thing and then another?

The Court: Well,——

Mr. Wulff: I object to that as entirely incompetent and immaterial.

The Court: That is immaterial. Objection sustained.

Mr. Perkins: All right.

Q. Have you observed with your own eyes and listened to orders with your own ears of men being ordered away [fol. 1234] from this conveyor to do something else?

Mr. Wulff: Well, if your Honor please, that is immaterial and incompetent unless we have the whole story about it.

The Court: The objection is sustained.

Mr. Wulff: We are concerned with the job he was doing at the time, not some job he may have done. He may have been assigned to a thousand different jobs.

The Court: The objection is sustained.

Mr. Perkins: All right.

The Court: Mr. Perkins, tell the Court what else you want to prove. I will see if I can get at it.

Mr. Perkins: If it please the Court, the whole gist of the case is that a carman doesn't mean a man——

The Court: (Interposing) This isn't a carman.

Mr. Perkins: Well, an upgraded carman.

The Court: An upgraded carman, is he?

A. Yes, your Honor.

The Court: All right.

Mr. Perkins: I believe he testified he was an upgraded carman.

Mr. Wulff: That is right.

Mr. Perkins: I want to show, your Honor, that an upgraded carman performs many, many tasks, some right out in the yard like fixing journal boxes on cars that come right in and out, they repair cars, they make new cars and they do many, many, a great variety of tasks, and the fact that a man happens to have the task of reaming at a [fol. 1235] particular moment——

The Court: (Interposing) Mr. Perkins, your own case here says and I gave it to you as a key to the situation and I hesitate to have to read it again.

Mr. Perkins: Is that the Lewis case, your Honor?

The Court: Yes, I am looking at the case.

Mr. Wulff: It is 271 you read from, your Honor.

The Court: I am looking at this 19 Cal. 2d.

Mr. Perkins: I think that Lewis case is 19 California 2d 284 that sets forth that moment of the injury test.

The Court: You see, here is what I mean, "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce or shall, in any way directly or closely and substantially, affect such commerce as above set forth." That is what they say there.

Mr. Wulff: That is the Act, your Honor.

Mr. Perkins: Well, however, your Honor, I believe that the rule is also that if a man is interchangeable between new and old construction he is under that rule.

Mr. Wulff: No.

Mr. Perkins: Well, here is a very good statement of it, your Honor, in A. L. R. It says that a man who is injured and is interchangeable between new and old construction.

Mr. Wulff: I will say that a man that works both in the interstate commerce and intrastate commerce, it doesn't make any difference what he is doing at the time of his injury if his duties require him to work under both. Here [fol. 1236] is a situation where we have a lot of carmen assigned to various jobs, tasks are assigned, some are interstate and some are not, some are required to do both. The question is what is this man doing at the job he held on the 10th day of July.

The Court: Well, in this particular case they say that benefits have been freely granted to workers injured in the course of repair or maintenance of interstate tracks or roadbeds or those who work interchangeably upon new and old construction. In other words, they work one day on this and another day on that.

Mr. Perkins: Yes.

The Court: And that is a particular part of their job, but it does not mean that you can switch to something else and they are working interchangeably like they are here. This gentleman was probably on this particular job from June. I don't know.

Mr. Perkins: Q. Well, would these men on the conveyor be interchangeable with other jobs?

Mr. Wulff: Just a minute.

A. Your seniority entitles——

The Court: Just a minute. Strike it out.

Mr. Wulff: This man is not competent to testify to the inner workings of the Southern Pacific Company, of the jobs and duties unless he has knowledge of them.

The Court: Objection sustained.

[fol. 1237] Mr. Perkins: Q. Well, I will hand you a seniority roster.

Mr. Perkins: Would you like to see that?

Mr. Wulff: Sure.

The Court: We will take a five minute recess, Mr. Smith.

(Recess.)

The Court: I will ask this witness a few questions. Mr. McElroy, these gondolas, how do they dump their load, like trucks that run around town?

A. No, the gondolas, some gondolas have bottom doors that they will dump their load from. Now, they hold several ton.

The Court: That would be dumping that right on the track then, wouldn't it?

A. That would be to one side of the track or in some instances these gondolas are unloaded by cranes.

The Court: I just asked how they dumped their load. Now, these ends, what part of the gondola are they attached to, are they the rear gate?

A. They are attached to the sides of the ends, your Honor. Visualize this gondola has a box, a box has two ends to it. These gondolas have two ends, one of them is known as the A end and B end. Now, they are fastened to the side of the car and, of course, to the end sills by riveting.

The Court: What is their purpose, these ends?

A. These ends are like the end I mentioned a minute ago, to keep the car—the ends of the car are the same as the ends of a box would be in order to keep the box so it would hold things, and you would have to put the two [fol. 1238] ends on it.

The Court: Are these ends the front and rear of the car, what make up the front and rear ends?

A. They make up the two ends. There is no front or rear end to that car, and they are the same with the exception of a brake staff on one end, which is a handbrake to slow the car down manually, and the other end which is the A end, which a carman refers to as the A end, which is the air end and the B end is the brake end of the car. The two ends are identical with the exception of the brackets that are placed on the ends after the ends are put together. The ends come in two sections and are riveted in approximately the center. This m: here was——

The Court: (Interposing) Just a minute. Describe one of those ends, one of those ends like he says he was working on, describe it so I can know just what it looks like.

A. Well, if you will give me a piece of paper I can show you easier.

The Court: Well, put it on that blackboard there. Show him that paper on the blackboard. Take some colored chalk there, I don't care what kind of chalk. You might draw a rough diagram of the car and then we will see where you are putting the end.

A. I will warn you in advance I am not much of an artist, but we will say that this is the car like that.

The Court: You will have to stand a little on the side and [fol. 1239] talk a little louder.

A. That would be looking at it as a car. Here is your wheels, would be down here like this. Now, this would be the end. That end is made in two pieces there where they are riveted together. Now, facing it, looking straight at the edge of it, it would be like that. The purpose of this is that the rivets, these pieces here are riveted to the ends, to the corner posts.

The Court: Mark that end a little plainer. I can't see what you have drawn there.

A. Looking at it you would see from the edge of it like you would look at the edge of this pencil, looking at it from the edge there, that would be about the shape of it. However, this rounds a little bit, but I am not trying to be too exact. These ends round a little bit, but looking at it in that manner then you can visualize it.

The Court: Is that a side view?

A. That is an edge view.

The Court: Edge?

A. A side view would be, you would look just at it so that it would look about something like that, and then it would be——

The Court: (Interposing) Just a minute. I can't see what you are drawing. Well, that looks like a square from here.

A. Well, it is actually—it isn't exactly square, of course. I imagine they are something like nine foot four or something in that length across.

The Court: I see.

[fol. 1240] A. And they are about, well, I would say probably about four foot this way, each one of them, and then they are riveted together here (indicating).

The Court: Well now, where is that attached onto the gondola?

A. It is attached on there like that. I would say that you take this and turn it up this way and if you take this and bring it right in here, you put it right on the end like that.

The Court: What is the purpose of that end?

A. That is to make the end of the car. That is actually the end of the car.

The Court: I see. That is practically the end of the car the same as the sides?

A. It is the end of the car the same as the sides.

The Court: All right, that is all. I guess we will have to take the noon recess. 1:30 this afternoon. All witnesses return at 1:30 this afternoon, please.

(Thereupon a recess was taken until 1:30 o'clock P. M. of the same day, Thursday, October 30, 1952.)

[fol. 1241] Afternoon Session

The hearing of the above entitled cause was resumed at 1:30 o'clock in the afternoon of said day, Thursday, October 30, 1952, before Hon. Malcolm C. Glenn, Judge of said Court. The plaintiff was represented by Thomas C. Perkins, Esq., acting as his counsel. The defendant, Southern Pacific Company, was represented by Horace B. Wulff, Esq.

Mr. Perkins: We have obtained some pictures, your Honor, of these gondola ends that might clarify it somewhat.

Q. I will show you a picture, Mr. McElroy, and ask you what that represents?

A. That is a gondola end.

Q. And is that an A end or a B end?

A. That is a B end.

Mr. Wulff: If your Honor please, I don't know what type of a gondola they have got. I have some photographs here of the one out of the 1000 cars they were making, showing the numbers 73,333, and the cars he was working on were between 47,000 and 47,999. Now, I am not skilled enough to say whether that is the same type or not, but I know this is the type if they can tie this in. That is a different number, entirely, the one they have.

Mr. Perkins: Q. Is this the same type as you were referring to this morning?

A. That is the same type as I was referring to this morning.

[fol. 1242] Mr. Perkins: We offer this in evidence, if your Honor please.

Mr. Wulff: May I see that, if your Honor please? I think I can identify it. May I ask the witness a question?

The Court: Do you want to look at it?

Mr. Wulff: Yes, I would like to see it too. I don't know what the purpose of the admission is, but I have no way of telling unless I get some information. May I ask the witness a question?

The Court: Yes.

Mr. Wulff: This photograph, does this car here have the dump bottoms from the floor?

A. No. No. No, they haven't. That has a door on the bottom that has a drop bottom door, yes.

Mr. Wulff: A drop bottom door?

A. If that is what you have reference to.

Mr. Wulff: In other words, the bottom inside the car?

A. That is right.

Mr. Wulff: It is unloaded by dropping the bottom out of it?

A. There is a series of doors clear across there.

Mr. Wulff: In this one here (indicating)?

A. That is right.

Mr. Wulff: That is the type of this boxcar?

A. That isn't a boxcar, that is a gondola.

Mr. Wulff: A gondola. Then, if your Honor please, this is not the same car, because the cars in question [fol. 1243] were solid bottoms, wooden bottoms.

The Court: The objection will be sustained to it. Mr. Wulff has one of these exact kind.

Mr. Perkins: All right, let us look at it. May I show that to the witness?

Mr. Wulff: Yes.

Mr. Perkins: Q. I will show you a photograph marked figure 18A end of car that was handed to me by Mr. Wulff. Would that be the same general type of end as was being manufactured in July, 1951?

A. That would be the same type of an end and the same type of a drop bottom door that I was referring to.

Q. In other words, the same type as on that other photograph, is that right?

A. That is right.

Q. Is that right?

A. That is right. This car here has a series of doors on the bottom the same as the one that you have there.

Q. So, in other words, this type of end is the same type end as that car, they are on the same type of gondola?

A. That is correct.

Mr. Perkins: At this time again I will re-offer the photograph.

A. This is the A end and that is the B end.

Mr. Wulff: May I ask him a question about this, please, sir? I want to find out what these drop bottom doors are.

Mr. Perkins: Q. Here is a figure marked 19. Is that a B [fol. 1244] end?

A. That is a B end and the same type of a car.

Q. And the same type as the photograph I first showed you?

A. Yes, that is right.

Mr. Wulff: May I ask one question for clarity, if your Honor please?

The Court: Yes.

Mr. Wulff: I will show you the bottom of this card and ask you to point out to me any drop doors there.

The Court: Point out what?

Mr. Wulff: Drop doors.

Mr. Perkins: Well, excuse me. Did you say that that is the same?

Mr. Wulff: I know it is. Whether he does or not, I don't know.

A. No, there is no drop bottom. There is no drop bottom doors on that type of car, but I am assuming that the looks of the outside of that end is the same as this one right here (indicating).

Mr. Walff: In other words, if this is the bottom of that car, then this car is not the same car that you have a photograph of, the same type of car?

A. Mr. Wulff, what I am going on is the end of the car and not the bottom or side or any other part of it.

Mr. Wulff: I understood you to testify this car had drop bottoms the same as the car you have a photograph [fol. 1245] of in your hand.

Mr. Perkins: That was another picture.

Mr. Wulff: No.

A. That is right, I assumed that there was drop bottom doors on the side of it because most of those cars do have the drop bottom doors on them.

Mr. Wulff: If this one hasn't, then it is a different type of car, is it not?

A. To the extent that there is a picture you showed me and there is no drop bottom doors on it.

The Court: Well, are we concerned with whether it has a drop bottom door or not? We will put it in evidence and find out later. Mark it Plaintiff's Exhibit 1.

(The photograph last above referred to was by the Clerk then marked Plaintiff's Exhibit No. 1.)

Mr. Perkins: Q. All right. I will show you a view, another photograph, and ask you what that depicts?

A. Well, that is the B end of a gondola identical to the other picture you showed me a while ago.

The Court: Is there any difference in what you call the A end and B end?

A. The A end doesn't have the brake staff brackets on it, your Honor, or the brake wheel. You will notice that on this B end.

The Court: The A end does not have the brake brackets, is that it?

A. The A end does not have the brake shaft brackets or [fol. 1246] the brake wheel.

Mr. Perkins: Q. The photograph that I just showed you is a B end with a brake bracket?

A. That is right, and this is a B end.

Mr. Wulff: If your Honor please, it is understood my objection goes to the introduction of these on the ground this is not the same type of car being manufactured?

The Court: If that turns out to be true and there is any reason for it, we will strike it out, but I want to get through with this pretty soon.

Mr. Perkins: We offer this photograph for the purpose of illustrating the ends.

The Court: This has to be marked differently.

A. This is a B end of a car that will be known as a gondola.

Mr. Perkins: We offer this, your Honor.

The Court: You better mark them whether they are A end or B end so we will know when we look at them.

(The photograph last above referred to was by the Clerk then marked Plaintiff's Exhibit No. 2.)

Mr. Perkins: Q. What did they do with those ends, I mean where did the ends go after they left the conveyor?

A. Well, then they shift them to one side and place them on a flatcar and take them to the point where they are placed on the cars that were being built, the gondolas that were being built.

Q. What were those gondolas composed of?

[fol. 1247] A. Well, they were the gondolas which were composed of parts of cars, some of them that are being assembled in the shops, some of the parts that were already made.

Mr. Wulff: Just a minute. I don't like to object. I have the same desire the Court has, a prompt proceeding, but this man is not qualified. He was not even working in that department. We have witnesses here who will testify to all that.

The Court: I was going to ask some questions.

Mr. Wulff: He hasn't been in this department since 1948.

The Court: I know, but that does not make any difference. The point is, what the Court is trying to find out, and I think he can testify the general way that they handle these things. According to his testimony these ends are one part of the job and they are working on the ends and after they got through with the ends, why, the system is that the gondola itself isn't there, they have to transport them and put them somewhere, take them away, and that is what I was going to ask him, whether they are put on the gondola right there or whether they are taken somewhere else. He must know that from his experience.

Mr. Wulff: He is not a qualified expert. We have a man——

The Court: You don't have to be an expert for that. After these ends are properly bored and whatever else they have to do on them, then they are taken to another part of Shop No. 9 are they?

[fol. 1248] A. That same shop, your Honor, Car Shop 9.

The Court: I say, they are taken to another part of Shop 9?

A. That is right.

The Court: And there what happens to them?

A. They are placed on the cars. As the car is moved along the assembly line these ends are placed on the car in the position that they belong.

The Court: On the gondola?

A. That is right.

The Court: I see. Well, is there a line of cars that they are working on usually?

A. That is right, and each man does a certain job on that line there as it goes along.

The Court: In other words, these gondolas are completely built and finished in Car Shop 9?

A. Yes, sir, they are built in Car Shop 9.

The Court: All right.

Mr. Perkins: All right.

Q. Now, where did the axles of these gondolas come from?

A. Well, the axles come from——

Mr. Wulff: (Interposing) If your Honor please, this man——

A. (Continuing) —used cars.

Mr. Wulff: This is hearsay entirely.

The Court: Objection sustained.

Mr. Wulff: He doesn't know anything about it, not that part of the business.

Mr. Perkins: All right.

[fol. 1249] Q. Now, you stated that you were at this time in 1951, you were a local chairman, is that right?

A. That is right.

Q. And that would be for the Carmen's Brotherhood, is that right?

A. That is correct.

Q. All right. Now, did you deal with management in regard to the jobs that the men had and the tasks that they performed?

A. That is part of the job as a local chairman, yes, sir.

Q. That you would have a say in the upgrading of carmen, is that correct?

A. Yes, we work in conjunction with management.

Q. And how about in the bidding of jobs, did you have any say in that as the local chairman?

A. The bidding, yes, we would have a part to say in that too.

Q. Did you arrive at any knowledge of the various tasks that men would be required to perform as local chairman?

A. We were required, yes, to know that, because sometimes your contract is violated, not in all cases on purpose, in some instances accidentally, but it was our duty to contact the management, and we did have very agreeable relations with management.

Q. Do you know of your own knowledge and capacity, and in your capacity as local chairman in July of 1951, did you gain knowledge as to the duties of a man reaming cars on the conveyor of this assembly line where Mr. Eufrazia worked?

Mr. Wulff: Just a minute.

A. It was our——

[fol. 1250] Mr. Wulff: Just a minute. Just a minute. I object to that as being entirely hearsay and no reference to any particular duties of Mr. Eufrazia, the plaintiff in this case.

Mr. Perkins: All right.

Q. With reference to the duties of Mr. Eufrazia.

Mr. Wulff: Pure hearsay, all coming from knowledge from other sources, hearsay sources.

The Court: Well, I think if you will bear in mind, even with the liberality of the rule, you will find that we are getting far afield. What we are trying to find out is whether or not this is a part of the job he was performing and the job he was performing was reaming from at least Ju[illegible], I guess, of 1951 until this accident happened.

Mr. Wulff: July of 1951.

The Court: Yes. Now, was that a part of his job that he was doing. Now, he may have had a lot of other assignments, and so forth. The objection is sustained. It ought to be easy enough to get the facts. I can't see why we are doing all this by the roundabout method.

Mr. Perkins: May it please the Court, Mr. McElroy——

The Court: I don't want any argument. I have gone over all that all morning. The case shouldn't take over an hour.

Mr. Perkins: Then I understand that the objection you have sustained is that Mr. Wulff objects to going into the nature of the man's duty or what his job was?

The Court: That isn't it.

[fol. 1251] Mr. Wulff: That isn't it at all.

The Court: That isn't apropos at all to the ruling. All you have to do is ask your questions and we will rule on them.

Mr. Perkins: Q. Do you know what Mr. Eufrazia's job was on July 10, 1951?

The Court: That has already been testified to a dozen times here.

Mr. Perkins: All right.

The Court: His job was to ream and bore those holes.

Mr. Perkins: Q. Did he have other jobs?

The Court: Well, just a minute. Just a minute.

Mr. Perkins: Q. Or other duties?

The Court: He might have a lot of other assignments that may have no connection with this at all. You can't extend this rule beyond those authorities I have given to you. Now, for instance, take the switchman, there is a close case, and the fact that he was not right at the moment on the job did not prevent them from showing that was a part of his regular duties assigned to him. Now, I am not going to make any more rulings because you ought to know them by this time.

Mr. Perkins: Then I understand that you sustain Mr. Wulff's——

The Court: I sustained just those that I ruled on. I tried to give you the rule.

Mr. Perkins: Would your Honor please make a ruling on that question, in other words, did Mr. Eufrazia have other duties besides reaming as of July 10, 1951?

[fol. 1252] The Court: Well, how does he know?

Mr. Perkins: Q. Well, do you know?

The Court: Well, he would have to be assigned to it.

Mr. Perkins: May I ask another question, your Honor?

The Court: Go ahead.

Mr. Perkins: Q. As part of your duties as local chairman of the Brotherhood were you familiar with his duties on July 10th?

The Court: Well, you have asked that a dozen times and now you are trying to ask if he had other duties and he would have to be assigned to them. He doesn't make the assignments.

Mr. Perkins: Well,——

The Court: Well, I have sustained it. Now, if you can't get close enough to these rulings, why, you are all through with them.

Mr. Perkins: You have sustained that objection to that question, is that right, your Honor?

The Court: I just sustained it.

Mr. Perkins: Well, I have no further questions. You may cross-examine.

Mr. Wulff: That is all. No questions.

The Court: That is all, thank you.

Mr. Perkins: He was off the stand, shall I go through with these other witnesses?

The Court: No, I was just trying to call Mr. McElroy to try to get some of the facts.

[fol. 1253] Mr. Perkins: All right.

The Court: Call whoever you want.

Mr. Perkins: May I have those time cards?

(Albert Eufrazia, Plaintiff herein, was thereupon recalled as a witness.)

Testimony of ALBERT EUFRAZIA, Plaintiff herein, witness recalled:

Direct examination

By Thomas C. Perkins, Esq., counsel on behalf of the plaintiff herein:

Q. I will show you a card and ask you if you recognize this card?

A. Yes.

Q. All right. What is that card?

The Court: Talk into the microphone.

A. Yes.

Mr. Perkins: What is that card?

A. That is the card I used to sign.

The Court: Is what?

Mr. Perkins: Q. Is that what you would sign every day?

A. Every day.

Q. That is your time card?

A. My time card.

Q. What is this writing on it, on a line directly underneath where it says your name, what is that marking in there? what does that stand for?

A. Well, repairing freight cars.

Q. And that is your signature there?

A. Yes.

[fol. 1254] Q. And that is Mr. Fagan's initial, is it?

A. Yes.

Mr. Wulff: May I see that, please?

Mr. Perkins: I will offer this as our exhibit next in order, your Honor.

Mr. Wulff: I object to that. It is self-serving. That is all right, I will withdraw my objection to that.

The Court: What is the date?

Mr. Perkins: The date is July 10, 1951, the day the man was injured. Now, we have a great many other cards on other dates showing different duties. I can offer these as a group.

Mr. Wulff: If it is June 13th I have no objection. That is the job he was assigned to at the time he was injured.

(The cards last above referred to were by the Clerk then marked Plaintiff's Exhibit No. 3.)

Mr. Perkins: Q. After you were injured that is after July 10, 1951, did you do any duties connected with running repairs?

Mr. Wulff: If your Honor please, that is entirely immaterial and incompetent.

The Court: Objection sustained.

Mr. Perkins: Q. What company gave you your paychecks in July for the period of July 10, 1951?

A. Southern Pacific.

Q. That was the Southern Pacific Company. And for this entire time, that is from September, 1950 until the time you were injured who would send you your paychecks?

[fol. 1255] A. Southern Pacific.

Q. They would all be signed the same, is that right?

A. Yes.

Q. Then you understood you were working for the Southern Pacific Company?

A. Yes, sir.

Mr. Wulff: I object. It is immaterial.

Mr. Perkins: Q. Who were you working for?

Mr. Wulff: Pur- conclusion of the witness, your Honor.

Mr. Perkins: I will withdraw that.

Mr. Wulff: What he understood.

The Court: There isn't any question about this.

Mr. Wulff: It is admitted by the pleadings.

The Court: Then why go into it?

Mr. Perkins: You admit he was an employee of the Southern Pacific?

Mr. Wulff: Certainly.

Mr. Perkins: All right, you may cross-examine.

Mr. Wulff: May I have that card, if your Honor please?

Cross-examination

By Horace B. Wulff, Esq., counsel on behalf of the defendant herein:

Q. Now, Mr. Eufrazia, I understand on June 13, 1951 you were assigned to the new car program, is that correct?

A. Yes.

Q. And what were your duties on that new car program?

A. Well, my duty was as working on gondola ends.

[fol. 1256] Q. In other words, reaming holes in gondola ends?

A. Yes.

Q. You did that same thing every day you worked from June 13 to July 10, the day you were injured?

A. Well, sometimes——

Q. I am speaking just from June 13, 1951 and July 10, 1951, that four week period, that is all I am talking about.

A. The four weeks period? Yes, we were working at that time on the gondolas ends.

Q. You did that every day?

A. Well, during that time.

Q. During that time?

A. That is right.

Q. Now, I notice on this card that is introduced in evidence here as Plaintiff's Exhibit No. 4, there appears the word 2807. Do you know what that means?

A. Yes.

Q. What does that mean?

A. That is a car number, a program number.

Q. That is a job number for the program dealing with the manufacturing of 1000 gondola cars, isn't that correct?

A. Yes.

Q. And that is the same program you worked on every day from June 13, 1951 until the time you were injured?

A. Yes.

Q. Now, in this program I understand you lift up these ends onto this platform or conveyor and when you got it up there you reamed holes. What part of the end did you [fol. 1257] ream the holes in?

A. Well, I reamed the holes in the center and it has got a rail on the top to put the brake rod in.

Q. Then what else did you do?

A. Well, after we get through reaming, we shove them to the next station.

Q. All right. Is that all you did then?

A. That's all we did there.

Q. That is what you did every day from June 13 now to July 10, 1951?

A. Yes.

Mr. Wulff: That is all. Thank you.

Mr. Perkins: All right, you may step down. We will call Mr. Humphrey.

(William Humphrey was thereupon called as a witness on behalf of the plaintiff herein.)

Testimony of WILLIAM HUMPHREY, witness produced on behalf of the plaintiff herein, sworn.

Direct examination

By THOMAS C. PERKINS, Esq., counsel on behalf of the plaintiff herein:

Q. Will you state your name to his Honor?
A. William Humphrey.
Q. Where do you live, Mr. Humphrey?
A. 7581 Park Drive, Citrus Heights.
Q. What is your occupation?
A. Upgraded carman's helper.
[fol. 1258] Q. Is that the same thing that Mr. Eufrazia is?
A. Yes.
Q. And what are your duties as an upgraded carman's helper?

Mr. Wulff: If your Honor please, I object to that unless he knows what job he is assigned to. They are put on ten or fifteen different types of work, different jobs entirely. It means nothing until you know what job it is.

Mr. Perkins: Q. Will you define what an upgraded carman's helper is, just tell us what it is?

A. An upgraded carman is a man who does work on new cars and rebuilds an- repairs boxcars and all freight cars.
Q. To be upgraded do you have to be qualified in any way, are there any qualifications to that?
A. That is up to your union and your management when you get upgraded.

Mr. Wulff: I don't see the materiality of this. We concede that this man is an upgraded carman.

Mr. Perkins: I think we should have a definition of what an upgraded carman is.

The Court: I think he has told us what it is.

Mr. Perkins: Very well.

Q. Are you acquainted with Mr. Eufrazia?
A. Yes.

Q. Have you ever worked on the same task as he was doing on the same conveyor?

Mr. Wulff: Objection.

The Court: Objection sustained.

[fol. 1259] Mr. Wulff: Unless the time is shown.

Mr. Perkins: Q. As of July 10, 1951 where were you working?

A. On the conveyor right beside Mr. Eufrazia.

Q. All right. And how long did you work on that conveyor more or less?

A. Well, almost two years.

Q. You worked two years on that same conveyor?

A. I am not sure exactly of the time.

Q. While you were working on that conveyor were you ever required to make running repairs?

Mr. Wulff: If your Honor please, I object to that as entirely immaterial unless they show the circumstances, the conditions, and, in other words, show that the two jobs were the same.

The Court: Required to make what kind of repairs?

Mr. Perkins: Running repairs.

The Court: What is that?

Mr. Perkins: That is repairs on cars of a like sort that would take a short time.

Q. Did you ever make such repairs?

The Court: Just a minute. The objection is sustained. It is too indefinite. It does not show time and place.

Mr. Wulff: I can't tell anything about it.

The Court: It does not have any relation.

Mr. Perkins: All right. Well, may I get at it this way and ask the witness if he made such repairs when he made them?

[fol. 1260] The Court: You ask the questions.

Mr. Perkins: In the spring and summer of 1951 did you ever make what is known as running repairs?

A. In the spring, is that what you said?

Q. Yes.

A. Yes.

Q. All right. And will you tell us what sort of repairs you did?

Mr. Wulff: Same objection, if your Honor please.

The Court: What do you call running repairs, please? What do you call running repairs?

A. Running repairs is cars that come in that have to be repaired so they can go back out on the main line again.

The Court: Well, that hasn't anything to do with reaming, has it?

A. No.

The Court: Objection sustained.

Mr. Perkins: Q. Well, part of the day would you be on the reaming and part of the day on running repairs?

A. I never reamed.

Q. Well, on this riveting on this assembly line?

A. No, not as a rule.

Q. Well, occasionally would that happen?

Mr. Wulff: Same objection, if your Honor please.

The Court: The objection is sustained.

Mr. Perkins: Q. Did this assembly line that you have referred to ever stop for a period and all the men get switched to another task?

[fol. 1261] A. It did for a while in the spring.

Q. And what sort of task would you do then?

Mr. Wulff: If your Honor please, same objection.

The Court: Objection sustained. We might as well be frank, Mr. Perkins, there is no jury here. What you are trying to do is to bring this within those cases that I have read to you and you are not getting very far with it because you do not bring up any parallel facts. Now, you might go on this way forever and you wouldn't get any farther unless you are going to come within those cases. I have read them two or three times before. We want to know just what the facts were on this particular job and if it is connected as these cases say, all right; if it isn't, why, that is another story.

Mr. Perkins: Q. You wouldn't be called just a riveter, would you?

The Court: Well, just a minute. It would not make any difference what he is called. Let him say what he does.

Mr. Perkins: Q. Just tell us what you do?

A. Now or at that time?

Q. Working on that assembly line?

A. I was driving rivets on the assembly line.

Q. Did you do anything else while employed by the Southern Pacific?

Mr. Wulff: This man's job is not in question, your Honor. It is what Mr. Eufrazia did. Same objection. I don't follow it.

[fol. 1262] The Court: Objection sustained. Let me ask as a matter of information, this assembly line, they all have different jobs, I suppose?

A. That is right.

The Court: For instance, one man will work on these ends and then when he gets through is that work passed on down the assembly line or what?

A. He worked on the ends reaming them out, then he pushed them down to our position and we drove the rivets. Then we passed it down farther.

The Court: In other words, it is one continuous line down the way. How many of those stations are there?

A. On the end position?

The Court: No, I mean right straight down the assembly line?

A. Oh, I couldn't say. There is quite a few.

Mr. Wulff: If you want to stipulate to that, I can stipulate to that.

The Court: Shop No. 9 is pretty big, isn't it?

A. Yes, it is.

The Court: Anyhow this gentleman does the work on the reaming, and so forth, and then that is passed on down to you by a crane, isn't it?

A. No, it is on a conveyor and they just push it down to us.

The Court: In other words, it is transported by some conveyor on the ground, is that it?

A. Yes, it is sort of a table like with rollers on it and they set the ends on this table like conveyor.

[fol. 1263] The Court: That has wheels?

A. It has got little rollers on it and the end sets on it and it just rolls right down when you push.

The Court: All right.

Mr. Perkins: Q. Well, were you subject to being ordered to do running repairs?

Mr. Wulff: Same objection, your Honor.

The Court: Same ruling.

Mr. Perkins: All right, you may cross-examine.

Mr. Wulff: No questions.

Mr. Perkins: We will call Mr. Duran.

(Monico Duran was thereupon called as a witness on behalf of the plaintiff herein.)

Testimony of Monico Duran, witness produced on behalf of the plaintiff herein, sworn.

Direct examination

By Thomas C. Perkins, Esq., counsel on behalf of the plaintiff herein:

Q. Will you state your name to the Judge, please?

A. Monico Duran.

Q. Mr. Duran, will you please state your name so the Judge can hear it?

A. Monico Duran.

Q. Where do you live, Mr. Duran?

A. Down here on 28 M Street.

Q. And what is your occupation?

A. It is an upgraded carman.

[fol. 1264] Q. An upgraded carman. How long have you been an upgraded carman?

A. Since May of '42.

Q. All right. Now, were you working for the Southern Pacific in July, 1951?

A. Yes, sir.

Q. And what was your job then and where were you then working?

A. Working on the decking the gondolas.

The Court: Doing what? I did not quite catch it.

A. I say working on the decking on the gondolas.

The Court: Working on the deck?

A. Decking.

The Court: Decking?

A. Yes, sir.

Mr. Perkins: Q. What did that job consist of?

A. Sir?

Q. What did the job of working on the decking consist of, what did you do to the decking?

A. Well, we shove the lumber up there to the other carman that was on the top laying the decking on the gondolas, that is the floor.

Q. And was that near the conveyor on which Mr. Eufrazia was employed at that time?

A. That is the same conveyor.

Q. You worked on the same conveyor that he did?

A. Yes, sir.

Q. And when did you first start working on the same conveyor?

A. Well, since they started until they done the whole work, the whole program.

Q. When was the first day that you yourself ever worked on this conveyor?

A. I not remember.

[fol. 1265] Q. What?

A. I not remember the first day.

Q. Well, was it a long time like a year or was it just a very short time, how long was that?

A. I can't hardly remember the date.

Q. Could you tell us how long you worked on this conveyor?

The Court: As I got it since this program was started. Is that what you said?

A. Yes, sir.

Mr. Perkins: Q. How long was that Mr. Duran, more or less?

A. Well, I not remember. I don't remember.

Q. All right. Now, while you had this job working—, by the way, you did work for the Southern Pacific Company, didn't you?

A. Yes, sir.

Q. While you did this or while this program was going on, were you ever put onto running repairs?

Mr. Wulff: Same objection, entirely immaterial and incompetent.

The Court: Onto what?

Mr. Perkins: Running repairs.

The Court: We have just sustained that on the previous witness and I don't see any distinction between him and this gentleman.

Mr. Perkins: All right.

The Court: Objection sustained.

Mr. Perkins: Q. Did this assembly line ever stop and all the men get switched to running repairs?

[fol. 1266] Mr. Wulff: If your Honor please, there is no proof that it stopped any time between June 13 and July 10.

Mr. Perkins: All right.

Mr. Wulff: If it didn't stop during that period it is immaterial.

Mr. Perkins: Q. Shortly prior to that period of June 13 did that assembly line ever stop?

Mr. Wulff: Entirely immaterial and incompetent.

The Court: Objection sustained.

Mr. Perkins: All right.

Q. Did you ever see Mr. Eufrazia doing any running repairs or repair work?

Mr. Wulff: When are you talking about, what dates?

Mr. Perkins: Q. Have you ever seen Mr. Eufrazia?

Mr. Wulff: I object to that as uncertain and indefinite.

The Court: What date are you referring to?

Mr. Perkins: Well, in the spring of 1951, did you ever see Mr. Eufrazia while employed by the Southern Pacific Company performing running repairs?

Mr. Wulff: Same objection.

The Court: Same ruling.

Mr. Perkins: All right. You may cross-examine.

Mr. Wulff: I have nothing to ask.

The Court: That is all. Call the next witness.

Mr. Perkins: All right, we will call Mr. Miller.

The Court: Don't call him for the same testimony because one witness is just as good as ten. If you are going [fol. 1267] to go through the same process, why, let's not call him.

Mr. Perkins: Well, if your Honor please——

The Court: You ought to know your witnesses.

Mr. Perkins: He has also been on this job.

The Court: I am just telling you if you have something different, why call him, otherwise let's not.

Mr. Perkins: Well, it is cumulative, your Honor.

The Court: If it is just that there is no use calling him, because if you are going to ask the same questions, the Court will make the same ruling. You have had three or four of them already.

Mr. Perkins: Through this witness I would show, your Honor, whenever they were short of materials the whole crew got switched over into running repairs.

Mr. Wulff: Your Honor, that is immaterial unless it is between June and July.

The Court: You tried to show that by these gentlemen long before this plaintiff ever started on this particular job and it has all been ruled out.

Mr. Perkins: Then I also show that that would happen intermittently and many times that this assembly line would stop.

The Court: We are not going to put in a statement like that because we don't know. How do you mean intermittently?

Mr. Perkins: Well, I mean quite frequently it would occur.

[fol. 1268] The Court: We don't know what that refers to, quite frequently.

Mr. Perkins: Well, I would say maybe six times in four months.

The Court: The same thing holds as the Court already

called to your attention, you should try to bring it within the cases I read. Call your witness or don't, I don't care.

Mr. Perkins: All right. I will call Mr. Walter Miller.

(Walter N. Miller was thereupon called as a witness on behalf of the plaintiff herein.)

Testimony of WALTER N. MILLER, witness produced on behalf of the plaintiff herein, sworn.

Direct examination

By Thoms C. Perkins, Esq., counsel on behalf of the plaintiff herein:

Q. Your name is Walter Miller, is that correct?
A. Walter N. Miller.
Q. And where do you live, Mr. Miller?
A. 5624 Broadway.
Q. Sacramento?
A. Sacramento.
Q. What is your occupation, sir?
A. I am a freight carman welder.
Q. Are you also a committeeman?
A. That is right.
Q. Of what are you a committeeman?
A. I am on the local protective board for the Carmen, the Sacramento General Shops.
[fol. 1269] Q. In what shop are you now working?
A. Car Shop 9.
Q. In July of 1951 in what shop were you working?
A. Car Shop 9.
Q. And how long have you been working at Car Shop 9?
A. I have been back at Car Shop 9 since about 1949.
Q. How long have you worked for the Southern Pacific in Sacramento?
A. In Sacramento, I came in October, 1945.
Q. In 1945. How long have you worked at railroads anywhere?
A. Since 1937.

Q. And are you familiar with the various tasks done at Car Shop 9 by carmen?

A. I am.

Q. And are you familiar with what work is done at Car Shop 9?

A. Yes, I am.

Q. All right. Would you tell us what duties an upgraded carman would have in Car Shop 9?

Mr. Wulff: Object, if your Honor please. The question is indefinite and uncertain. I don't know which job.

The Court: Objection sustained.

Mr. Perkins: Q. Well, would a man in Car Shop 9 be subject to orders to do various tasks?

Mr. Wulff: Same objection.

The Court: The objection is sustained.

Mr. Perkins: Q. Are you familiar with this program that was being carried on in July of 1951 of the construction of gondola cars?

A. Yes, I was there all through that program.

[fol. 1270] Q. Did you ever work on that program yourself, sir?

A. No, I didn't.

Q. However, you by your own observation observed the work there, is that correct?

A. I am familiar with the work.

Q. And you would be on other tasks at that time?

A. All the time.

Q. But you would see with your own eyes what was going on there, is that right?

A. That is right, I am in close connection with all the men.

Q. From time to time various grievances might occur and that you would look into the jobs from that respect?

A. That is right.

Q. All right. Now, could you tell us—and also you are familiar with the conveyor where Mr. Eufrazia was employed, is that correct?

A. I am.

Q. And they were doing what on that conveyor?

A. They were assembling gondola ends.

Q. And where did they send these ends to afterward?

A. After the ends come off of the conveyor, they were loaded on cars and taken to the station where they were loaded in the car itself.

Q. And how would they be transported from the conveyor to the car itself?

A. They were loaded onto specially built flat cars to do this particular job.

Q. That would be pulled by a switch engine?

[fol. 1271] A. Yes, they were pulled by a switch engine.

Q. Then where would the other parts of the gondola car come from?

A. They came from various places.

Mr. Wulff: I don't think the man knows.

Mr. Perkins: Q. If you know.

A. It is not hearsay with me. I know where they came from. The frames come from Western Consolidated-Steel Company. The lumber came from our own sawmill.

The Court: No, just a minute. What he means, I think, is not from those distant points, but what we are trying to get, as I understand it, is just the modus operandi there, not whether they came from distant points. Let me ask this, this gentleman, is he the first one that works on the assembly line, does his work initiate the line?

A. This gentleman in question?

Q. Yes.

A. As far as the assembly line itself is concerned, no, the job he was working on at that time was separate from the assembly line entirely.

The Court: Well, we got the impression here that it was on the assembly line.

A. No, sir. It is a phase of it, but it isn't a part of it.

The Court: It isn't part of the assembly line?

A. It isn't part of the assembly line.

The Court: Well, you better explain that to us because I have understood that it was a part of the assembly line [fol. 1272] and it was pushed to the next man.

A. No, sir.

The Court: That isn't true?

A. No, that isn't true.

The Court: You tell us.

A. Where the gondola ends are made is a separate place. Nothing is assembled at that spot, but the gondola ends are loaded on flat cars and taken to the assembly line and as these cars moved up the ends are put on the car at what was called the end position.

The Court: Well, the flatcars do not mean the regular railroad flatcars?

A. Well, they are a regular railroad flatcar, but they are built especially to handle the ends.

The Court: Well, I mean, aren't they cars or conveyances that they push along?

A. Yes, they are regular railroad cars, but they are just used there in the shop primarily for that job of transporting.

The Court: Are they cars that run on tracks?

A. Yes, sir, they run on rails.

The Court: Just like a regular flatcar?

A. The ends are assembled on these cars and then they are sent over to the assembly line by a switch crew.

The Court: After they are completed they are put on these flatcars, is that it?

A. Well, after they are completed they are loaded on the flatcar to be mounted to the car itself, the car that [fol. 1273] is being assembled.

The Court: I mean after these gentlemen ream, after they get through their job, then where do they go?

A. They come off the end of this conveyor and are loaded then on the flatcars.

The Court: And those flatcars go where?

A. Go to where the ends are to be assembled to the car itself, that is the car being built.

The Court: In other words there is a flatcar in there running on rails. Does it go down along the assembly line?

A. Yes, they have got various spots where the material is spotted on the assembly line.

The Court: Those are put on the flatcar?

A. All put on specially built cars.

The Court: Then that goes where after they get through with the assembly, where does it go?

A. You mean the flatcars or the parts?

The Court: The parts we are talking about.

A. The parts are all assembled and it becomes a car itself and it goes on out to the yard.

The Court: Including the body of the car, it is all made in there?

A. Well, no, it isn't all made, it is all assembled there.

The Court: I see. Well, I mean it is all put together by the time it gets through that assembly line?

A. That is right.

[fol. 1274] The Court: Including the wheels and everything else?

A. Everything, including the paint.

The Court: Then it is complete?

A. It is complete, they are painted and numbered when it reaches general service.

Mr. Perkins: Q. What do you mean by when it is ready for general service?

A. Where it may be assigned.

Q. In other words, after the gondola is made, then it goes out onto the railroad tracks to haul freight, is that it?

A. That is right.

Mr. Wulff: Just a minute. I object to that unless he knows where the car goes of his own knowledge.

A. I don't know.

The Court: He must know something about it.

A. I don't know where the car goes. I just said it is assigned to general service. Nobody else that builds them knows where they go.

Mr. Perkins: Q. What do you mean by general service?

A. General railroad service. They are all shipped out of the state before they go in service.

The Court: What becomes of them after they leave the shop?

A. Evidently they get into general service.

Mr. Perkins: Q. In other words, when they are taken out of the shop, they are pulled out by locomotives, is that right?

A. That is right, and they are also moved around the [fol. 1275] shop by locomotives.

Q. And these particular ends that Mr. Eufrazia was working on would be loaded on flatcars and locomotives would pull them, wouldn't they?

A. That is right.

Q. Now, in assembling a gondola, you stated that the gondola car was assembled in Car Shop 9. Now, where would the axles of those gondola cars come from, if you know?

A. The axles and the wheels come from the car machine shop.

Mr. Wulff: If he knows where the axles on the cars at the time involved here came from. We have a lot of sources. These axles come from various sources. It all depends on the particular time. If he knows at the time we have here involved, on July 10, I have no objection; otherwise I am objecting as pure hearsay.

Mr. Perkins: Q. Do you know that, Mr. Miller?

A. I wouldn't know exactly where they came from, no.

Q. Would you know if they were new or old?

A. Well, yes.

Mr. Wulff: Just a minute. If he knows on that particular day.

Mr. Perkins: Q. Well, at that particular time?

A. I wouldn't know. Are you talking about July 10th?

Q. July 10th.

A. I wouldn't know.

Q. Well, say in the period of July, maybe not right on that exact day, but in that period, do you know if some of those axles were used?

[fol. 1276] A. Well, yes, but I wouldn't know as to knowing what day they were used or what car.

Q. But from your own observation you do know some of them were used?

A. That is right, new and used.

Q. Where would the used axles come from?

Mr. Wulff: If you know of your own knowledge.

A. They would come from various places. I wouldn't have any way of knowing that.

Mr. Perkins: Q. Would you know whether they were taken from old cars?

A. Well, sure, because there are a lot of wheels in the car machine shop in Sacramento that are used in the building of new cars.

Q. Then you know by your own observation that some of these axles would come from old cars, taken off of them and put on these new gondolas?

A. That is true.

Mr. Wulff: May I ask this witness a few questions? What is your job, please, does it include the purchase or arranging for the purchase of axles?

A. I made no claim to purchase anything.

Mr. Wulff: Your only knowledge is from seeing things?

A. My only knowledge is what?

Mr. Wulff: From seeing axles?

A. Certainly.

Mr. Wulff: Now, can you tell us any particular day that you saw an axle go in any of these new cars?

[fol. 1277] A. I couldn't give you any definite dates, no, sir, but I do know it is along with my job as being one of the local committee that I do go up to the car machine shop and I see them right there where they are mounting wheels on old axles.

Mr. Wulff: You don't know where those wheels go from there?

A. I know some of them come to Car Shop 9.

Mr. Wulff: Would you know as a fact these 1000 gondola cars, that all new axles were used?

A. I wouldn't know one way or the other.

Mr. Wulff: Would you say my statement was correct or incorrect?

A. I wouldn't say it was correct or incorrect.

Mr. Wulff: That is all.

Mr. Perkins: All right.

Q. Now, are you familiar with how a man is upgraded from a helper to an ungraded helper?

A. I am.

Mr. Wulff: I don't see the materiality of it, your Honor.

Mr. Perkins: Well, this man is an upgraded helper.

The Court: Well, that is admitted. It does not make any difference how he got there.

Mr. Perkins: Well, they have certain qualifications, your Honor, that I think——

The Court: Well, they admit that he is qualified. They do not deny that. Go ahead and ask another question. [fol. 1278] Let's not delay this too long.

Mr. Perkins: Q. How long does a man have to be an upgraded helper before he can become—or rather an upgraded carman's helper before he may be a carman that can get a job on other railroads as a carman?

Mr. Wulff: That is immaterial, your Honor.

A. He has to work 1040 days.

The Court: The objection is sustained.

Mr. Wulff: And the answer is stricken, your Honor?

The Court: Strike out the answer.

Mr. Perkins: Q. Do you know of your own knowledge from your experience and observation what the duties of an upgraded helper would be on July 10, 1951 in Car Shop 9, what would they include?

Mr. Wulff: I don't see the materiality of it.

The Court: Well, I think the question would be what was his work and what was he doing, including what was a part of his job at that time. You see, this gentleman was doing a particular job from June until July 10. Now, he may have been assigned a number of times to something else. Maybe it had no connection with this, but we want to know the facts.

Mr. Perkins: Well, I would like to show, your Honor, that he is subject to being ordered to do anything.

The Court: We have gone over that before. There is no use to keep repeating it.

Mr. Perkins: All right. Well, I do think that is im-
[fol. 1279] portant, your Honor, that what the man was subject to being ordered to do in his particular job. In other words, like you might say that a fireman——

The Court: (Interposing) Well, we went all over that. I read all your authorities and we made the ruling.

Mr. Perkins: I have some more authorities, your Honor.

The Court: Well, I think you have given me enough. The ones you gave me didn't particularly apply except to enlighten us a little bit as to how broad this particular Act is. All right, ask another question or call the next witness.

Mr. Perkins: Did I understand I am overruled?

The Court: Ask a question.

Mr. Perkins: May I ask him that question and your Honor rule on it?

Q. Do you know what this man was doing or what an upgraded carman's helper working in the Southern Pacific Shops on the conveyor referred to by Mr. Faifrazia would be subject to doing?

Mr. Wulff: Same objection. Same type of question as before.

The Court: Same ruling.

Mr. Perkins: All right, you may cross-examine.

Cross-examination

By Horace B. Wulff, Esq., counsel on behalf of the defendant herein:

Q. When these new cars are going out of the shop, do you know whether they are going out under a bill of lad-
[fol. 1280] ing or not?

A. I wouldn't know.

Q. You don't know whether they are going out as freight or going out as part of a train?

A. No, I wouldn't know.

Mr. Wulff: That is all.

Mr. Perkins: Well, we rest at this time, your Honor.

The Court: Defense.

Mr. Wulff: Mr. Johnson

If your Honor please, we have a particular type of program here involved.

The Court: I will get that in your argument.

Mr. Wulff: Very well. I thought I would clarify it.

(Albert S. Johnson was thereupon called as a witness on behalf of the defendant herein.)

Testimony of ALBERT S. JOHNSON, witness produced on behalf of the defendant herein, sworn.

Direct examination

By Horace B. Wulff, Esq., counsel on behalf of the defendant herein:

Q. Now, will you state your name, please?

A. Albert S. Johnson.

Q. And by whom are you employed?

A. Southern Pacific Company.

Q. And in what department?

A. The accounting department.

Q. What is that?

A. Accounting department.

[fol. 1281] Q. Accounting department?

The Court: Accounting?

A. Accounting department.

Mr. Wulff: Q. And what is your particular position, sir?

A. My title is Assistant Chief Clerk to the Assistant General Auditor.

Q. Now, are you in charge of all of the auditing work and bookkeeping of this Southern Pacific Equipment Company?

A. It comes under my supervision.

Q. And are you familiar with the instigation of a program for the building of cars by this Southern Pacific Equipment Company?

A. I am.

Q. And I will show you a resolution which purports to

be from the board of directors of the Southern Pacific Equipment Company and ask you whether or not that is the resolution that instigated the program?

Mr. Perkins: Well, your Honor, I will object to this. We don't know anything about any Southern Pacific Equipment Company.

The Court: The objection is overruled. Is this an authenticated copy?

A. This is an authenticated copy.

Mr. Wulff: This is a certified copy?

A. This is a certified copy.

The Court: This is a certified copy?

Mr. Wulff: Would the Court want to read that of should I read it?

[fol. 1282] The Court: Well, read a part of it.

Mr. Wulff: "Resolved that this company construct in accordance with the plans and specifications furnished and to be furnished by the Southern Pacific Company the following equipment at the total estimated average cost of $9,800,000."

There are three types of cars and we are only concerned here with one of them, and that is the 1000 50-ton gondola cars and the appropriate unit price is $4210.00, or an approximate total price of $4,210,000.

"Resolved further the President and Vice President of this company be and they are hereby severally authorized, empowered and directed in the name and on behalf of this company to place orders for all necessary materials and supplies required for and enter into the construction of the aforesaid cars to be constructed by this company and such orders be placed with the company or companies representing the bids most favorable to this company considering the lowest price or prices for materials and supplies are agreeable and the reliability of bidders financially or otherwise to deliver the property."

Now, we introduce this under the appropriate exhibit number, please.

The Court: That is A, I guess.

[fol. 1283] (The resolution last above referred to was by the Clerk then marked Defendant's Exhibit A.)

Mr. Wulff: Q. Now, relative to the instigating of this building program for 1000 gondola cars as well as the other cars set forth in that resolution, do you know whether the Southern Pacific Company and the Southern Pacific Equipment Company entered into a contract?

A. I do.

Q. Which contract was relative to the using of the employees of the Southern Pacific Company and their shop facilities for the building of these cars?

A. That is correct.

Mr. Perkins: Well, your Honor, I think I objected to this as no foundation—I mean, what is this Southern Pacific Equipment Company? I have never heard of that. Maybe it is just another alter ego of the S. P. Company.

Mr. Wulff: It is a part of the program. I am giving all the facts on how these cars are built. The Southern Pacific Company is hired as an independent contrac merely to furnish the labor and the shop facilities. is a certified copy of the contract.

Mr. Perkins: May I ask several questions pertaining to that document? You say you are the what is it now?

A. I am Assistant Chief Clerk to the Assistant Chief Auditor of the Southern Pacific Company, general office at 65 Market.

Mr. Perkins: Do you have anything to do with this [fol. 1284] Southern Pacific Equipment Company?

A. I do. The accounts of that company come under my supervision. They are maintained at 65 Market Street under a bureau of our office.

Mr. Perkins: That is the same building, is it not, that the Southern Pacific Company is located in?

A. That is correct.

Mr. Perkins: You are from that building, is that right?

A. That is right.

Mr. Perkins: Who owns the stock of the Southern Pacific Equipment Company?

A. Southern Pacific Company.

Mr. Perkins: It owns all the stock?

A. That is correct.

Mr. Perkins: I see the name of Mr. Hildebrand on that as Vice President of the Southern Pacific Company: Who is he?

A. He is a Vice President.

Mr. Perkins: Who is Mr. Hildebrand?

A. In what respect?

Mr. Perkins: Is he also connected with the Southern Pacific Company?

A. He is Assistant Secretary of the Southern Pacific Company.

Mr. Perkins: Are you employed by the Southern Pacific Equipment Company?

A. I am employed by Southern Pacific Company.

Mr. Perkins: But you do work for the Southern Pacific [fol. 1285] Equipment Company, is that right?

A. Well, I supervise their accounts. I don't actually do the mechanics, but it comes under my supervision.

Mr. Perkins: Who pays you?

A. Southern Pacific Company.

Mr. Perkins: Well, does the Southern Pacific Equipment Company have a payroll?

A. It does have a payroll?

Mr. Perkins: Does it have a payroll?

A. It does not have a payroll.

Mr. Perkins: It does not. It does or it doesn't?

A. It doesn't.

Mr. Perkins: It does not, is that right?

A. That is correct.

Mr. Perkins: And all the stock is owned by the Southern Pacific Company, is that right?

A. That is right.

Mr. Perkins: All right.

The Court: Mark this Defendant's Exhibit B.

Mr. Wulff: I was going to introduce that.

(The contract last above referred to was by the Clerk then marked Defendant's Exhibit B.)

Mr. Wulff: The Court has looked at that?

The Court: Yes.

Mr. Wulff: Well, I don't think it is necessary, but since it has been raised I will introduce a certified copy of the article of incorporation of the Southern Pacific Company. [fol. 1286] The Court: All right.

Mr. Wulff: As an appropriate exhibit.

The Court: That is number C.

(The articles of incorporation last above referred to were by the Clerk then marked Defendant's Exhibit C.)

Mr. Wulff: Q. Now, do you know the P number given the contract for the construction of 1000 gondolas?

A. I believe that was P-3601.

Q. 3601?

A. Yes.

Q. I beg your pardon?

A. I am not sure of that until I see the record.

Mr. Wulff: Q. 3061.

A. 3061, that was my recollection, but I wasn't sure.

Q. Now, after the Southern Pacific Equipment Company has arranged for the manufacturing and building of these cars, do they sell these cars to someone?

A. The Southern Pacific Equipment Company assigns its contract.

Q. I will show you this document and ask you whether this is a photostatic copy of a document being a memorandum agreement from the Southern Pacific Equipment Co. to George Smith and H. J. Wiley, hereinafter called the purchasers, whereby they contract for 380 50-ton gondola cars?

A. Yes.

Q. To your knowledge are these 380 cars a portion of the 1000 covered by the contract and resolution heretofore introduced?

[fol. 1287] A. That is right.

Q. Where is the original of this, by the way?

A. May I see that document again? The original of this would be with the trustee in Philadelphia.

Q. Philadelphia?

A. Pennsylvania Company for banking and trusts.

The Court: I don't understand what this is.

Mr. Wulff: That is a portion of the cars, the cars being constructed on or about July 10, 1951.

The Court: An assignment by the Southern Pacific Equipment Company? There is no evidence here that the Southern Pacific Equipment Company owned these cars.

Mr. Wulff: Oh, yes, it has already been introduced.

The Court: Which one?

Mr. Wulff: That first resolution shows it. It was a program to build these cars. That is just exactly what I am doing, your Honor. The first resolution shows that the Equipment Company is to build $4,000,000 worth of cars including 1000 gondolas.

The Court: Even though they are built in the Southern Pacific Shops?

Mr. Wulff: This is the employment, the contract between the Equipment Company and the Southern Pacific Company whereby the Southern Pacific Company uses their employees and rents their shop facilities.

The Court: Oh, I see.

[fol. 1288] Mr. Wulff: In other words, they are employed as an independent contractor then when this is done.

The Court: I will get it from the witness. Mark it number D.

(The document last above referred to was by the Clerk then marked Defendant's Exhibit D.)

Mr. Wulff: Q. I will show you a photostatic copy of a contract and ask you what that is, sir?

A. This document represents an assignment by the vendors to whom the contract is assigned in the first place to the trustee, which is known as the Pennsylvania Company for Banking and Trusts.

Q. Of Philadelphia?

A. Philadelphia.

Mr. Perkins: Would you repeat that last statement?

The Court: The Pennsylvania Company for Banking and Trusts.

Mr. Perkins: I think they ought to be identified. Who are they?

A. They are a financing company.

Mr. Wulff: Investment.

A. Investment company.

Mr. Perkins: Is that also owned by the Southern Pacific Company?

A. It is not.

Mr. Perkins: Who owns that?

A. I don't know.

Mr. Wulff: A stock company, a corporation. This will show you how the whole thing is financed.

Q. Now, I show you a document here and ask you if you are familiar with this and does this cover—in the first place, let me introduce this last exhibit. That is the [fol. 1289] contract between George Smith and Wiley as vendors to the Pennsylvania Company for Banking and Trusts called the trustee.

(The document last above referred to was by the Clerk then marked Defendant's Exhibit E.)

A. This is the trust that covers these particular cars that are involved in these documents.

Mr. Perkins: Well, are you through?

Mr. Wulff: Just a second.

Q. This contains two agreements, does it not?

A. That is right.

Q. This contains the trust agreement in which the Pennsylvania Company for Banking and Trusts and the Southern Pacific Company and George W. Smith and J. H. Wiley, as vendors, are parties which deal with the financing; then there is a lease of this equipment from the Pennsylvania Company for Banking and Trusts to the Southern Pacific Company and a purchase agreement?

A. That is right.

Q. And the two documents are under one cover?

A. Under one cover.

Mr. Wulff: I offer this in evidence.

Mr. Perkins: Your Honor, this purports to be an original, does it?

A. No.

Mr. Perkins: A copy?

[fol. 1290] A. That is a conformed copy.

Mr. Perkins: This is not a true copy?

A. It is a true copy.

Mr. Perkins: It is verbatim, is that right?

A. I don't understand what you mean.

Mr. Perkins: By verbatim I mean word for word?

A. It is word for word, that is correct.

Mr. Perkins: Well, I will object to this as being immaterial and irrelevant how they financed the building of these cars. I don't think that is a question.

Mr. Wulff: It goes further than that.

The Court: It goes further than that. It shows it goes from one to the other and then back to the trust company

and then the trust company finally leases it to the Southern Pacific Company. Put it in evidence.

(The document last above referred to was by the Clerk then marked Defendant's Exhibit F.)

Mr. Wulff: You have no objection? The original is in Philadelphia.

A. This is a conformed copy.

Mr. Perkins: This man is under oath, he knows.
Mr. Wulff: That is right.

A. I know that it is signed and executed.

Mr. Perkins: You know that is verbatim?

A. That is right.

Mr. Perkins: Have you compared them?

[fol. 1294] A. I did not actually compare them, but so many are signed and so many are conformed.

The Court: That is the trust they work under.

Mr. Perkins: But you of your own knowledge, you haven't compared them; you don't know if they are the same?

A. I know it is the same, but I did not check it word for word, but it is printed at the same time and so many are signed and executed and the others are conformed like any other document.

Mr. Wulff: Q. Now, I will show you a document and ask you if that purports to be—what that purports to be?

A. This is a bill of sale from Southern Pacific Equipment Company to the trustee, known as the Pennsylvania Company for Banking and Trusts.

Q. Dealing with a portion of the gondola cars in question?

A. That is right.

Mr. Wulff: May that be introduced in evidence with an appropriate number?

The Court: It may be received in evidence.

(The bill of sale last above referred to was by the Clerk then marked Defendant's Exhibit G.)

Mr. Wulff: This is illustrative of how the Equipment Company buys all the materials.

Q. Now, do you know, Mr. Johnson, where the Southern Pacific Equipment Company obtains the materials that go into these gondola cars?

A. The materials are purchased from various manufacturers.

[fol. 1292] Q. By whom?

A. On orders placed by the Southern Pacific Equipment Company.

Q. Well, are they paid for by the Southern Pacific Equipment Company?

A. They are paid for by the Southern Pacific Equipment Company.

Q. The Equipment Company does not supply any parts whatsoever for any of these cars?

Mr. Perkins: I will object to your leading the witness.

The Court: Sustained.

Mr. Wulff: Q. Does the Southern Pacific Company supply any parts that go into these cars?

A. There are certain materials purchased from the Southern Pacific Company, but they are paid for by the Equipment Company through billing and vouchering and paid for in cash.

Q. I will show you here a voucher together with accompanying invoices and ask you whether that is illustrative of the buying from outside concerns to the Southern Pacific Company for parts that go into these gondola cars?

Mr. Perkins: I will object to that as immaterial.

A. This is a typical invoice rendered against the Southern Pacific Equipment Company.

Mr. Perkins: I object to that. What do you mean typical?

Mr. Wulff: I didn't bring up all the vouchers. I just brought one to be illustrative of the transaction.

Mr. Perkins: I will object.

A. We can produce those.

[fol. 1293] Mr. Wulff: Q. This is a voucher where the Southern Pacific Company paid the supplier for this equipment?

A. That is right.

Q. Together with the invoice sent by the supplier to the Equipment Company?

A. Equipment Company, that is correct.

Q. And all the other parts are handled the same way?

A. That is right.

Mr. Wulff: Do you want to see that, your Honor?

The Court: No.

Mr. Wulff: May that be introduced in evidence, please?

(The invoice last above referred to was by the Clerk then marked Defendant's Exhibit H.)

Mr. Wulff: Q. You testified that certain parts are purchased from the Southern Pacific Company and paid for by the Equipment Co., and I will show you a photostatic copy of a voucher of the Southern Pacific Equipment Company and the voucher of the Southern Pacific Company relative to that item as illustrative of that transaction, and ask you whether it is so illustrative?

A. This is a Southern Pacific Equipment Company voucher, a copy thereof, in payment of an invoice rendered by Southern Pacific Company covering certain matrial furnished the Equipment Company included in Order P-3061.

Q. Does that refresh your memory as to the number?

A. That is right, that is the one.

[fol. 1294] Q. Does this also show the purchase of——

A. (Interposing) The orders are listed in here.

Q. I think I have given you the wrong one here.

A. No, for material?

Q. I think I gave you the wrong one. This is for labor, I am pretty certain.

Mr. Perkins: That is right.

Mr. Wulff: I will use that later. Yes, I did, I beg your pardon. Yes, withdraw that.

Q. I will show you another voucher and invoice and ask you whether that deals with materials purchased by the Equipment Co. from the Pacific Co.?

A. This is what I was looking for. This covers the payment by the Southern Pacific Company to the Southern Pacific Equipment—by the Southern Pacific Equipment to the Southern Pacific Company for material furnished by the Southern Pacific Company which includes the order that is dealt with here.

Q. That includes 310 wheels, cast iron wheels, car wheels, and also some 500 ton wheels?

A. Yes.

Q. It includes 2000 brake shoes?

A. That is right.

Mr. Wulff: May this be introduced and an appropriate exhibit number as illustrative of the document whereby the Equipment Company pays the Southern Pacific Company?

(The document last above referred to was by the Clerk then marked Defendant's Exhibit I.)

[fol. 1295] Mr. Wulff: Q. Now, we have referred to a contract between the Southern Pacific Equipment Company and the Southern Pacific Company whereby the Southern Pacific Company agrees to furnish the labor for a reasonable price and also to furnish shop facilities and tools, and I ask you whether this voucher deals with the payment by the Southern Pacific Equipment Company to the Southern Pacific Company for that service and for those employees, for the use of said employees, which also includes the voucher by which the invoice was paid?

A. This is the Southern Pacific Equipment Company voucher in payment of a bill from the Southern Pacific Company for labor and other expense incurred in connection with the program we are dealing with.

The Court: I don't understand just what that is.

A. It is a Southern Pacific Equipment Company voucher or check, you might say, in payment of an invoice rendered

by Southern Pacific Company for labor in constructing the cars involved plus other expense, shop expense, and so on and so forth.

Mr. Wulff: Let this be introduced in evidence with an appropriate exhibit number.

(Thereupon the voucher last above referred to was by the Clerk then marked Defendant's Exhibit J.)

Mr. Wulff: Q. Just as a matter of explanation, I notice it says, "Shop expense 6 per cent."

A. That is agreed to in the construction agreement that was introduced earlier in the evidence.

[fol. 1296] Q. Six per cent of what, do you know?

A. I would like to ask Mr. Baylor to answer that question. It is billed by the Southern Pacific Company.

Q. In other words, all you know is what is billed to you?

A. That is right, but he would be the one.

Q. To tell us how that is arrived at?

A. That is correct.

Q. Now, do you know how these cars are delivered?

A. What do you mean?

Q. To the trust company?

A. How they are——

Q. How they are delivered, when and how and how they are paid for and how and when does title pass?

The Court: Wait just a minute. Just one question at a time.

Mr. Wulff: Q. I think that is too compound. Do you have any jurisdiction now over the billing of the Pennsylvania Company for Banking and Trusts?

A. That is correct. The Southern Pacific Equipment Company, that is the Accounts Bureau where the accounts are maintained, renders an invoice, which was introduced in evidence, against the Pennsylvania Company for Banking and Trusts monthly for convenience, covering cars delivered in the prior month, the payment is due on the 25th, actually on the first of the following month.

Q. Do you know of your own knowledge when title [fol. 1297] passes on these cars?

A. Title passes when the bill of sale is delivered to the trustees together with the invoice of the Equipment Company.

Q. Until that delivery is made the title to all the parts, etcetera, rests in the Equipment Co.?

A. The invoice against the trustee, as will be noticed in the document presented in evidence, specifying that the title to the equipment shall remain in the builder until payment has been made by the trust company, the Pennsylvania Company for Banking and Trusts.

Q. Do you know where these cars are delivered?

A. Do I know where these cars are delivered?

Q. That is right.

A. Well, they will deliver them to various points.

Q. Are they within or outside the State of California?

A. Outside the State of California.

The Court: Just a moment. Delivered by whom?

A. They are delivered to the agent of the trustee, the agent the trustee designates.

The Court: Delivered by whom?

A. By the Equipment Company.

The Court: The Equipment Company?

Mr. Wulff: Q. Now, do you know how these cars are shipped there or are they shipped; tell us about that, please.

A. The cars are shipped there by bill of lading, on the regular commercial billing to the points designated by the [fol. 1298] Transportation Department.

Q. In which case the Southern Pacific Company is the carrier, is that correct?

A. I beg your pardon?

Q. Who is the carrier?

A. S. P. Company.

Q. Who would be the consignor?

A. The consignor is the agent for the trustee.

Q. That is the consignee?

A. That is right.

Q. Who is the consignor?

A. Pardon me? I misunderstood you.

The Court: He means the Equipment Company.

A. That is right. I am sorry. Withdraw that. It is mixed up.

Mr. Wulff: Q. I notice that in those exhibits there they are marked T and N O. Do you know what if any arrangements were made relative to the T and N O?

A. That is Texas, New Orleans Railroad Company.

Q. T and N O?

A. T and N O are the initials used.

Q. Do you know what the transaction was whereby they came into this transaction at all?

A. Well, on any program; the T and N O, certain cars are assigned to that company for their use on their lines, and they are leased to T and N O, and they, of course, are owned by the trustee and they lease the cars to Southern Pacific Company until payment is made therefor and the Southern Pacific Company in turn subleases to the T and N O.

Q. That was done in this instance?

A. That is right.

[fol. 1299] The Court: Not in all instances?

Mr. Wulff: It was done in this instance.

The Court: I mean—

A. Your Honor, only in respect of T and N O cars.

The Court: But I mean these 1000?

Mr. Wulff: Gondolas?

The Court: That does not apply to all of those?

A. All of the gondolas that were leased to T and N O.

Mr. Wulff: Q. Isn't that right, all of the gondolas?

A. I think so, yes, they were all gondolas.

Mr. Perkins: Well, he didn't say that they were all T and N O gondolas.

Mr. Wulff: Q. Have you any knowledge of that?

Mr. Perkins: He said he just thought so. I will object.

A. The gondolas were sublet to T and N O Company.

Mr. Perkins: That does not mean all these 1000 cars?

A. No, only the cars that are sent out for their use.

Mr. Wulff: Q. Now, do you know for whom the Southern Pacific Equipment Company builds cars?

A. For whom?

Q. Yes.

A. Southern Pacific Equipment Company builds cars for Southern Pacific Company, including the T and N O. They build cars for Pacific Fruit Express Company and, of course, in addition to constructing the cars in the shops, that is I mean in the shops, company shops, railroad shops, they acquire equipment from outside builders through or-
[fol. 1300] ders placed by the Southern Pacific Equipment Company.

Q. You buy cars from outside builders?

A. That is correct.

The Court: Well, I might ask this question: Has this Equipment Company any shops or plant itself that it builds cars in?

A. No, your Honor, that is where the agreement comes in. In other words, the first agreement, one of the first documents introduced here, covers the agreement between the Southern Pacific for the use of Southern Pacific Company shops, the facilities and employees.

Mr. Wulff: Q. Now, do you know where the Pacific Fruit Express cars are built?

A. Yes, they are built at Roseville and Colton.

The Court: Where-*sle*?

A. Colton.

The Court: San Bernardino, down that way?

A. Yes, and Los Angeles.

The Court: Are those all S. P. shops?

A. No, your Honor, those are Pacific Fruit Express Company shops and the same agreement for the use of those shops is entered into between the Southern Pacific Equipment Company and the Pacific Fruit Express.

Mr. Wulff:

Q. Do you know who the owner of the Pacific Fruit Express is?

A. It is owned jointly by the Southern Pacific Company and Union Pacific Company.

[fol. 1301] The Court: Southern Pacific Company and what else?

A. The Union Pacific Company, your Honor.

Mr. Wulff:

Q. I think I overlooked the agreement between the Equipment Company and the Pennsylvania Company for Banking and Trusts that you spoke of.

A. I mentioned it. One thing I brought out specifically was the labor part of the bill. That is where it mentions the ownership.

Q. I will ask you whether this is a billing of a portion of the cars, of the gondola cars, covered by this purchase order of 3061?

A. That is correct.

Mr. Wulff: And may that be introduced in evidence, your Honor, as an appropriate exhibit number?

The Court: Received.

(The document last above referred to was by the Clerk then marked Defendant's Exhibit k.)

Mr. Wulff: You may cross-examine.

The Court: Mr. Perkins, I think we will take the afternoon recess. We will take a short recess.

(Recess.)

Mr. Perkins: Shall we proceed, your Honor?

Cross-examination.

By Thomas C. Perkins, Esq., counsel on behalf of the plaintiff herein:

Q. Mr. Johnson, I believe you stated some of these cars [fol. 1302] went to the T and N O Railroad, is that right?

A. That is right.

Q. And that is entirely owned by the Southern Pacific, isn't that correct?

A. That is correct.

Q. It is a subsidiary?

A. It is 100 per cent owned.

Q. A subsidiary of Southern Pacific?

A. That is correct.

Q. And also the Southern Pacific Equipment Company is a subsidiary of Southern Pacific, isn't that right?

A. That is correct.

Q. All right. Now, how would these cars, when they are completed be moved—you say some of them get assigned to the T and N O—how would they be moved from the Southern Pacific Yard in Sacramento to their destination?

A. Well the operating department—of course, I am in the accounting department—but I do know the operating department designates the point of delivery.

Q. The operating department of what company?

A. The Southern Pacific Company, the ultimate lessee.

Q. In other words, when a car is completed in the shops in Sacramento the operating department of the Southern Pacific Company designates where these cars are to go, is that correct, sir?

A. That is correct.

Q. All right. Then how are they moved from the Southern Pacific Company Shops in Sacramento to the point of destination?

A. By rail.

Q. All right. Then they are pulled by locomotives, are [fol. 1303] they not?

A. Presumably.

Q. What crew operates the—I withdraw that. Do they go to the point of destination as a train or as a part of another train?

A. They would have to be a part of a train, wouldn't they?

Q. In other words, do they just hook up these new cars in one train?

A. I actually don't know. That is not within my province, how many cars go out in a train or otherwise.

Q. So, for all you know they would assemble a train of cars built in the shops in Sacramento and move them all as one train to some point in, say, Texas or Nevada or somewhere else, isn't that correct?

A. Well, I wouldn't say that is correct. I imagine they would be made part of a train.

Q. You assume but you don't know?

A. I don't know because it is not within any province.

Q. And, of course, the locomotive propelling that train is owned by the Southern Pacific Company and operated by Southern Pacific Company, isn't that correct?

A. It would be over their own lines, yes.

Q. All right. Now, I understand that this title to these particular cars while they are being built is in this Equipment Company, is that your testimony?

A. That is correct.

Q. Then the title passes to another railroad company on that company paying this Banking Company in Pennsyl-
[fol. 1304] vania, is that correct?

A. That is not correct.

Q. What is correct?

A. The title passes to the trustee that finances the equipment at the time payment is made and the bill of sale is presented by the Equipment Company.

Q. Do you mean to say that the title never passes to the Southern Pacific Company?

A. Not until the trust certificates are paid for.

Q. That is just a method of financing the building?

A. That is correct, they can't have the title until they have paid off the mortgage.

Q. Is it not correct also that as soon as the car is financed, that is paid for, that it passes to this railroad?

A. It passes to the trustee.

Q. To the trustee and from there to the railroad, is that right?

A. After the railroad has paid off the trust certificates over a period of years, whatever it happens to be, ten years, fifteen years.

Q. In the meantime they are operated over the line?

A. That is correct, under lease from the trustee.

Q. And are all cars that are built in the Southern Pacific Company Shop in Sacramento built under this arrangement with the Southern Pacific Equipment Company?

[fol. 1305] A. Do you mean on the financing?

Q. On this arrangement with the Southern Pacific Equipment Company?

The Court: Well, let's keep it within this program.

Mr. Perkins:

Q. Well, all right. Now, you have testified that in this program that they were building, what was it, P. F. E. refrigerator cars, boxcars?

Mr. Wurf: That is not correct.

The Court: Not this program.

A. Not this program. The question was asked as to whether they constructed equipment for companies other than Southern Pacific Company, and P. F. E. was mentioned, but not as part of this program.

Q. That is right. So, there would be other building programs going on there also, isn't that right?

A. Not at the Sacramento shops. P. F. E. would be in P. F. E. shops.

Q. Is the only program in Sacramento this Southern Pacific Equipment program?

A. That is correct.

Q. On new cars?

A. New cars.

Q. That is all sorts of new cars?

A. All sorts, whatever is specified.

Q. And the majority of those cars ultimately vest title in the Southern Pacific Company, isn't that correct?

A. Ultimately, after the trust has been paid off. In other [fol. 1306] words, they are financed under trust.

Q. Ultimately they all wind up with their title in the Southern Pacific Company and are being operated by the Southern Pacific Company, isn't that correct?

A. When the trust has been paid off, but in the meantime while the trustee has ownership, Southern Pacific Company is the lessee.

Q. That is right, it is operating them and it is collecting freight from their operation?

A. That is correct.

Q. And ultimately the Southern Pacific would get title to the car?

A. That is right, unless they decided to finance them or mortgage them again.

Q. But they get the beneficial use of them, they operate them on their trains, collect freight for the use of them?

A. They operate them on their lease.

Q. All right. Now, the Southern Pacific Equipment Company has nothing to do with the payroll of the men in the shops in Sacramento, has it?

A. The labor performed—I mean the cost of labor is billed to the S. P. Equipment Company by Southern Pacific Company, all the labor that is performed on the program.

Q. That is right, but it is just billed as one bill, so much expense, isn't that right?

A. It is the actual labor.

Q. That is right, but you keep no account of any indi-
[fol. 1307]. vidual workman, do you?

A. Well, the bills are based on their time.

Q. Their aggregate time, but the allocating of how much time goes to the new car construction and how much time goes to running repairs, for instance,——

A. There is no running repairs involved in this. This is new construction, this bill.

Q. You don't mean to say that all the work done by carmen in the Southern Pacific Shop 9 is new construction, do you?

A. The new construction is billed against the S. P. Equipment Company, that is the total aggregate labor new construction.

Q. But you wouldn't know whether that was all one individual man's time or a part of the time he was doing new construction and part of the time running repairs, would you?

A. My understanding is that it is all new construction.

Q. But do you mean all the work in this shop?

A. Whatever is performed on those new cars, new construction, and it is billed against the Southern Pacific Equipment Company.

Q. But if you will answer my question now, you don't know whether that is all performed by the same workman or whether the workmen are switched interchangeably from new construction to repairs, do you?

A. That would not be within my province. Naturally in my capacity I could not answer that question.

Q. You are not purporting to testify to that, are you?

[fol. 1308] A. I couldn't.

Q. And as far as the actual operation of building the car, that is what man will work on that car and for what time, this Southern Pacific Equipment Company would have nothing to do with that, would it?

A. Well, it is handled by the supervisors I assume.

Q. Of the S. P. Company, isn't that right?

A. That is right.

Q. Not of the S. P. Equipment Company?

A. That is right.

Q. And the men would be employed by the S. P. Company?

A. They are carried on the S. P. Company payroll and their time, as I mentioned before, is billed against the Equipment Company.

Q. And the Equipment Company has nothing whatsoever to do with directing the men in the manner of doing the work, has it?

Mr. Wulff: If your Honor please, I haven't objected, but this is all the subject matter of a written contract which is the best evidence, of course. The written contract is in evidence.

The Court: I presume that is so. In other words, the contract shows what the Equipment Company has to do and what the Southern Pacific Company does. This gentleman would know as to payrolls.

Mr. Wulff: All you know is payrolls, you don't know about the management end of it?

[fol. 1309] A. No, I have nothing to do with management. Naturally I wouldn't be able to answer the question on assignments or anything like that.

Mr. Perkins:

Q. You couldn't deny, could you, that a man might work, say, half a day on this new car construction and then be transferred by the foreman to running repairs?

A. I wouldn't know.

Mr. Wulff: I don't know why you don't drop that, Tom.

Mr. Perkins: I have no further questions.

Mr. Wulff: That is all.
The Court: That is all.
Mr. Wulff: Just a minute.

Redirect examination.

By Horace B. Wulff, Esq., counsel on behalf of defendant:

Q. Do you know whether or not the Southern Pacific Equipment Company pays the freight in the transportation of these new cars to the point of destination?

A. It is handled on commercial billing in the name of the Equipment Company. In other words, it is billed by the Equipment Company.

Q. And billed by the Equipment Company and collected?

A. That is right.

Q. And the Southern Pacific Company is paid for the freight?

A. The Southern Pacific Company is paid for the freight.

Recross-examination.

By Thomas C. Perkins, Esq., counsel on behalf of plaintiff:

[fol. 1310] Q. This Equipment Company has no physical assets; has it?

A. It has no plant or equipment. That is why they have to contract with the Southern Pacific Company to furnish the use of the shops and its facilities.

Q. What is it capitalized at?

A. $500.00.

Q. $500.00?

A. That is right. Do you mean the capital stock?

Q. Yes, what is the capital stock?

A. $500.00.

Q. What are the total assets?

A. Well, those vary, of course, according to your programs.

Q. The number of cars, and so forth?

A. That is right.

Q. What would be the net worth?

A. Well, that would be varying also according to the programs. I mean, I couldn't state any figures at this time or at any given time without getting them from the records.

The Court: Without trying to go too much into detail, I will ask this witness if he knows as a matter of fact, is the board of directors the same on these two corporations?

A. They are not, your Honor.

The Court: That is all.

Mr. Wulff: There are no interlocking directors.

Mr. Perkins:

Q. As a matter of fact, didn't you just testify that Mr. Hildebrand was an officer of the Southern Pacific Company?

A. But not a director.

The Court: I am talking about directors. That is all. [fol. 1311] Call the next witness.

Redirect examination.

By Horace B. Wulff, Esq.:

Q. Just one other question, Mr. Johnson. Isn't it a fact that Mr. J. M. Betterton designates the point of delivery?

A. Well, he is designated by the agent to receive delivery.

The Court: Just a minute. Does the contract not provide for that, who designates it?

Mr. Wulff: I am not too familiar, I can't say.

The Court: Call the next witness.

Mr. Wulff: Mr. Hitke, please.

The Court: If you want to call him back after you examine the contract, that is another story.

Mr. Wulff: That is all.

(Harry J. Hitke, was thereupon called as a witness on behalf of the defendant herein.)

Testimony of HARRY J. HITKE, witness produced on behalf of the defendant herein, sworn.

Direct examination.

By Horace B. Wulff, Esq., counsel on behalf of the defendant herein:

Q. Would you state your name, please?
A. Harry J. Hitke.
Q. And by whom are you employed, sir?
A. By the Southern Pacific Company.
[fol. 1312] Q. And in what capacity?
A. As general foreman of the freight car shop known as Car Shop 9.
Q. And how long have you held that position, sir?
A. Since September 1, 1947.
Q. How long have you been employed by the Southern Pacific Company?
A. Since January 2, 1925.
Q. And just give us generally the capacities you have worked in?
A. I am sorry, I didn't hear you.
Q. Just give us generally the capacities you have worked in for the company?
A. I started out on January 4, 1925 as a carman apprentice.
The Court: Just a minute. That is too remote. Let's get down to something.

Mr. Wulff: I just wanted to get the background.
The Court: I know, but that is all taking a lot of time.
Mr. Wulff: I will hurry along.

Q. Would you state just what functions are performed by Car Shop 9?
A. Car Shop 9 performs many functions. We have a new car program, we have general repairs on old freight equipment, heavy repairs on old equipment, light repairs on old equipment and running repairs on old equipment, all performed in Car Shop 9.
Q. Now, are the carmen employed in those various capacities?

A. They are.

[fol. 1313] Q. Who has the obligation of assigning men to these various jobs?

A. I do.

Q. Among these various projects, does any project take preference over the others?

A. The new car program takes precedence over all other work in Car Shop 9.

Q. For whom do you build new cars?

A. For the Southern Pacific Equipment Company.

Q. For anybody else?

A. Nobody else.

The Court: I did not catch that question and answer, Mr. Smith.

(Thereupon the last question and answer were read by the reporter.)

The Court: All right, go ahead.

Mr. Wulff:

Q. Now, are you familiar with the consideration paid the Equipment Company for the use of the shop facilities, Car Shop No. 9 facilities?

A. Yes, sir.

Q. Can you state that consideration, sir?

A. The Southern Pacific Company is——

Mr. Perkins: I will object to this.

Mr. Wulff: The contract says reasonable price. I am trying to get the specific price.

Mr. Perkins: Does he know of his own knowledge?

Mr. Wulff:

Q. Do you know of your own knowledge?

A. Yes, sir.

[fol. 1314] Q. Proceed.

A. The exact percentage is 6 per cent of direct labor.

Q. What is that for, sir?

A. For the use of shop facilities.

Q. Are there any other charges or consideration that flow from the Southern Pacific Company to the Equipment Company for the manufacture?

A. All of the direct labor for the fabrication and assembly of the new equipment is charged against the Southern Pacific Equipment Company by the Southern Pacific Company.

Q. Now, do you know who owns all of the supplies and materials that go into the manufacture of these cars?

A. The Southern Pacific Equipment Company owns all of the supplies and material.

Q. Now, is any of this equipment manufactured by the Southern Pacific Company?

A. Certain parts are manufactured by the Southern Pacific Company.

Q. Are they in turn purchased then by the Equipment Company from the Southern Pacific Company?

A. The raw material is purchased by the Southern Pacific Equipment Company. We in turn fabricate it and charge the direct labor for the fabricating.

The Court: Pardon me just one minute. This 6 per cent of the direct labor, is that the only amount that the Equipment Company pays for, is that what you mean?

[fol. 1315] A. For the labor, yes, your Honor. There is another percentage, 2 per cent that the Store Department is paid for handling all of the material.

The Court: Who pays for the balance of the percentage for labor?

A. The total cost of the labor is paid by the Southern Pacific Equipment Company and the Southern Pacific Company also obtains 6 per cent of that total figure for the use of the shop and the facilities.

The Court: Oh, in other words, that 6 per cent comes back, is that is, to Southern Pacific?

A. It goes back to the Southern Pacific Company.

Mr. Wulff:

Q. In other words, you pay 106 per cent of labor?

A. Yes.

Mr. Wulff: Does that clarify it, your Honor?

Q. In other words, you reimburse the Southern Pacific Company for the full amount of all labor, full cost of the labor?

A. That is correct.

Q. As compensation for the use of the facilities you pay a sum equivalent to 6 per cent of the total labor cost?

A. That is correct.

Mr. Wulff: Does that clarify it, your Honor?

The Court: I don't think that would be 106 per cent.

Mr. Wulff: That is 100 plus 6 any way you figure it.

The Court: Go ahead.

Mr. Wulff:

Q. They pay 100 per cent labor, am I correct in [fol. 1316] that?

A. That is correct.

The Court: Go ahead.

Mr. Wulff:

Q. Now, do you know as to what job Albert Eufrazia was assigned on July 1—July 13, 1951?

Mr. Perkins: July 13?

Mr. Wulff:

Q. I mean June 13, 1951.

A. On June 13, 1951 Mr. Eufrazia was assigned to assembling ends for the new car program.

Q. And how long did he stay on that job to your knowledge up to and after his accident, if you know?

A. He stayed on that job up to the date of his accident on July 10, 1951.

Q. Now, can you state all of the duties of Mr. Eufrazia under that assignment?

A. His duties under that assignment were to ream various holes in the assembly of the steel ends for the new car program, also to place those ends on the conveyor for the assembly of the ends.

Q. Did he have any other duties?

A. No other duties but his assignment on the new car program.

Q. Did he have any duties to make light repairs on cars?

A. No.

Q. Or heavy repairs on cars?

A. Not during that assignment, no.

Q. Are you familiar with how these new cars when they are completed are shipped to the point of destination?

[fol. 1317] A. Yes, sir.

Q. Do you know who designates the point of destination?

A. Mr. G. M. Betterton.

Q. In what capacity, sir?

A. He is the agent for the Banking and Trust.

Q. You mean Pennsylvania Company for Banking and Trusts?

A. That is right.

Q. Do you receive any instructions as to where they are to be sent?

A. I do.

Q. What are your instructions in that regard dealing with only the 1000 gondola cars in question?

A. Dealing with this particular lot of cars we were ordered to send some of these cars to Oregon, some of these cars went to Nevada.

Q. Now, do you know whether the Southern Pacific Company is paid freight for the hauling of these cars?

A. They are paid freight for the hauling of these cars to the destination.

Q. Do you know who the consignor is in that operation, do you know anything about the consignor, the shipper, in other words?

A. The shipper is the Southern Pacific Equipment Company.

Q. And who is the consignor?

A. Mr. J. M. Betterton, agent for the Pennsylvania Company.

The Court: What is his name?

A. J. M. Betterton.

[fol. 1318] The Court: B-e-t-t-e-r-t-o-n?

A. That is right.

The Court: Agent for the finance company?

A. That is right.

Mr. Wulff: You may cross-examine.

The Court: Before you cross-examine I want to ask him, one of the witnesses testified that this particular job that

the plaintiff was on was more or less an independent job and was not in the assembly line.

A. That is correct, your Honor. We have a regular assembly line made up of some eighty spots which moves every twenty-five minutes from one spot to the other. The ends were assembled in a separate location, loaded on what we have made up as a special car and transported to our assembly line.

The Court: I see. In other words, the special car is a regular flatcar, I presume, running on rails?

A. That is correct.

The Court: And where does that go as far as these ends are concerned?

A. It is switched from the west end of our shop to the east end of the shop and set in alongside of our assembly line.

The Court: And what becomes of them then?

A. The ends are taken off of this special flat by means of an electric overhead hoist and are applied directly to the car.

The Court: In other words, they are part of the construction of the car at that point?

A. That is correct.

[fol. 1319] The Court: I see.

Mr. Wulff: Now, if your Honor please, I have some photographs here of the assembly line which may be illustrative and help the Court see what goes on.

The Court: If you want to put them in, it is up to you to offer them.

Mr. Wulff:

Q. It doesn't show the line where these ends are made. Have you got a photograph by chance where the ends are assembled?

A. I do have that in some of the other programs. I thought it was in this folder here, but I see it is not.

Mr. Perkins: We have no objection to this folder with the understanding that it does not intend to depict the actual place that the plaintiff was working, it is just general views of the shops.

Mr. Wulff: It shows the production line, Tom, the production line proper. It does not show the line where the ends are assembled.

Mr. Perkins: That is right, it does not show this man's position.

Mr. Wulff: It shows the wheels at the very commencement to the completed car.

Q. Do you want to look at that?

A. The first picture shows the assembly of the trucks for the car and it runs right on down through the various production stages to the finished car.

[fol. 1320] The Court: Well, that is the assembly line?

A. That is the assembly line, yes, your Honor.

Mr. Wulff: It is illustrative only.

Mr. Perkins: And it does not illustrate this particular conveyor. That is also understood?

Mr. Wulff:

Q. You might state what interval of time they are on each spot in the line?

The Court: He stated that.

A. You mean how often we move the line?

Mr. Wulff:

Q. That is right.

A. Every twenty-five minutes in this particular program.

Q. Now, can you tell us how many cars are completed a day?

A. In this particular program there were eighteen cars per day.

Q. And how many cars are on the production line at any one time?

A. In this program there were eighty.

Q. So therefore it takes about eighteen divided into eighty days to produce one car?

A. That is correct.

Q. Four and a half days you would say?

A. That is correct.

Mr. Wulff: May this be introduced in evidence and appropriately marked with an exhibit number?

The Court: Just for illustration?

Mr. Wulff: That is all it is offered for, your Honor.

(The photograph last above referred to was by the Clerk then marked Defendant's Exhibit L.)

[fol. 1321] The Court: Are you through with this witness?

Mr. Wulff: Yes, you may cross-examine.

Mr. Perkins: All right.

Cross-examination.

By Thomas C. Perkins, Esq., counsel on behalf of the plaintiff herein:

Q. You stated that these ends were moved around on a shop car that traveled on rails and is like a boxcar, isn't that right?

A. Traveling on rails, yes.

Q. What pulls it or pushes it?

A. A switch engine that has been assigned to Car Shop 9.

Q. That is a regular locomotive, in other words?

A. A regular locomotive, yes.

Q. All right. Now, I believe you have also testified that the component parts of these various gondola cars were made, some parts were manufactured by the Southern Pacific Company, is that right?

A. That is correct.

Q. Like in the foundry they would manufacture wheels, isn't that right?

A. We obtained the new wheels from the foundry.

Q. And, of course, the metal in those wheels may have come from old wheels that were melted down, is that correct?

Mr. Wulff: I think it is immaterial what the raw material was.

The Court: The objection is overruled.

A. All new cast iron wheels require a certain portion of [fol. 1322] secondhand cast. They cannot make up a new cast iron wheel with all new cast metal.

Mr. Perkins:

Q. Now, will you answer my question?

Mr. Wulff: I think he has answered it.

Mr. Perkins: I don't think he has. He said some of the metal for these wheels come from old wheels.

Mr. Wulff: He said all of them do.

Mr. Perkins: All of them do.

Q. In other words, you so testify?

The Court: Let him answer.

A. As I stated all new cast iron wheels have to have a certain portion of secondhand cast iron which is made up from broken cast iron parts and a lot of old wheels are broken up to obtain these parts.

Q. All right. Where would they get these broken up wheels that you refer to?

A. Various scrap where wheels are taken out of service.

Q. They would be owned by the Southern Pacific Company or some finance company?

A. I don't understand your question.

Q. In other words, when they are making the metal to go into these various wheels, you say it comes from scrap metal and old wheels, as I understand it, is that right?

A. That is correct.

Q. All right. Now, I am asking you where did they get this scrap metal and these old wheels?

[fol. 1323] A. Some of the scrap wheels are purchased from the various other companies, some of it comes off of our own line.

Q. In other words, it comes right off of your equipment that has come from service and is scrapped and then goes into this foundry, isn't that correct?

A. Some of it does, yes.

Q. And that would be the source of the wheels for this gondola program that we are talking about, isn't that right?

A. That is correct, they are cast new wheels, yes.

Q. Now, are any of the parts comprising any of these gondolas in this particular program used parts?

A. Not in this particular program, no, they are all new parts.

Q. They were all new parts?

A. That is correct.

Q. How about the axles?

A. In this particular program they were all new.

Q. All right. Well now, of course by this particular program you are referring to just this gondola program going on on July 10 of 1951, is that what you mean, sir?

A. That is correct, yes, sir.

Q. How long would it take you to complete that program; how long would that program last to make those 1000 cars?

The Court: Do you mean the whole program?

Mr. Perkins:

Q. That 1000 gondola program?

A. We produced those cars at the rate of eighteen a day. There are 1000 cars which would give you the amount of days required to complete the program.

[fol. 1324] Q. Is that a seven day week?

A. Five day week.

Q. Five day week?

A. Right.

Q. So then we could get the answer by dividing that?

A. That is correct.

Mr. Wulff: The witness can tell you the day the program started and finished if you wish.

Mr. Perkins:

Q. Now, Mr. Hitke, on this same line, as I understand it, there is a sort of a conveyor down there that they were constructing or reaming these ends, isn't that right?

A. That is right, they were assembling the ends on this conveyor system.

Q. And you use the same conveyor for many programs, isn't that right?

A. For all of our new car programs.

Q. That is right. I mean you used that conveyor, it is used practically constantly, sometime you would make refrigerator cars, boxcar ends, is that right?

A. Not refrigerator.

Q. Well, you would make boxcars?

A. Boxcars were assembled on that same conveyor.

Q. And——

Mr. Wulff (Interposing): We are only going into the ones we are dealing with. We are only dealing with one program. That is all this man ever worked on.

Mr. Perkins:

Q. How many men would be on this conveyor where Mr. Eufrazia worked?

A. There is a possible fifteen, twelve to fifteen men at [fol. 1325] that location.

Q. And that work would be changed from time to time?

A. Only on my direct assignment. If I for some reason wanted to move a man from that end assembly area, I could re-assign him to another job.

Q. In other words, he is subject to your orders to do anything in Car Shop 9, isn't that right?

A. That is correct.

Q. You could say to this man, "Get off this assembly line and do some work on this car that is only in here for an hour and then you go right back," if you wanted to?

A. That has never been done.

Q. However, you could, couldn't you?

A. If I wanted to, I could, yes.

Q. All right. Well, you say it has never been done. Do you say that this assembly line was just constantly going every working day in the year?

Mr. Wulff: Your Honor, this is not proper cross-examination. I didn't go into that.

The Court: Well, this gentleman has testified, and also a previous witness, that the work that this gentleman, the plaintiff, was engaged in was not connected directly with the assembly line. I take it from what he says that their work could go on even though the assembly line wasn't operating, although it might be impractical, because after all they are fabricated into one complete whole.

[fol. 1326] Mr. Perkins: All right, may I withdraw that question. I will put another question.

Q. Isn't it true that this particular conveyor engaging about fourteen or fifteen men would not be in operation every working day of the year?

A. It would have to be in operation in order to keep our assembly line going.

Q. Was your assembly line going every day in the year?

A. It was going. Only in a couple of instances when we ran out of material it was closed down for a period of one month in January of 1951 to February 13, 1951, when we had run out of material. At that time the whole gang as a unit was re-assigned to other duties.

Q. And during that time the gang, some of them would be doing running repairs?

A. Whatever my assignment was at that time, yes.

Q. Some of that could be running repairs and other repairs?

A. During that period of that month it was all repair work.

Mr. Wulff: It is not proper cross-examination. It is immaterial.

The Court: Objection sustained.

Mr. Wulff: Move to strike it out.

The Court: Strike it out.

Mr. Perkins:

Q. Isn't it true that Mr. Eufrazia himself did running repairs at various times while in your employ?

Mr. Wulff: Same objection, if your Honor please, unless [fol. 1327] he says what job he is assigned to.

The Court: It depends upon what period you are talking about.

Mr. Perkins: Well, say, the period from March 7 to June 13.

Mr. Wulff: Object to that because he was not assigned to this particular job at that time.

The Court: Objection sustained. That is prior to the time he was assigned to this job.

Mr. Perkins: All right.

Q. When the Southern Pacific hires a man they don't just hire him for one job, do they?

A. All employees coming to Car Shop 9 come to me for interviews. They in turn are hired and are returned to me for assignment and I assign those men to any point in the shop that we need the employees on that particular day.

Q. That is right. And as your needs change from time to time you have the right to switch them, don't you?

A. Yes, re-assign them to various jobs.

Q. And you at times assign some people from repair work to new construction, don't you?

A. I do due to absenteeism and also sickness. Our new car line is our most important program. That comes first as far as our duties are concerned in Car Shop 9.

Q. Isn't it also true that you have on various instances shifted men?

[fol. 1328] Mr. Wulff: That is immaterial and incompetent.

Mr. Perkins:

Q. From the new line?

Mr. Wulff: He has never been shifted the whole time he was working on this job. He had to be re-assigned.

The Court: I have ruled on that many times here during the day. What are you talking about; what period of time?

Mr. Perkins: Well, say, the time that this conveyor line is going, your Honor, like, say, July of 1951, from time to time you would change men from new construction and move them over to running repairs in certain instances?

A. No, we never have done that. There is only one way that I do re-assign them from new car construction and that is if the man requests it himself due to sickness or if the man that is on the new car line that I figure I can make better use of him on other work, I will re-assign him and place another man in his place.

Q. Precisely. If you feel that that man should go over to running repairs, you can do that, is that right?

Mr. Wulff: This is all immaterial and incompetent.

The Court: The objection is sustained. We have passed on that not once but many, many times.

Mr. Perkins:

Q. Now, you have testified that these various cars, some would go to Oregon, some would go to Nevada, I believe you said, is that correct?

A. That is correct.

Q. You testified about some finance officer in some company in Pennsylvania designating where they would go, is [fol. 1329] that right?

A. That is right.

Q. All right. Now, what physical place would they actually go to?

A. They are billed to various locations in Nevada or in Oregon, such as in Oregon they would go to Eugene or Klamath Falls, and in Nevada they would go to Thorn, Nevada.

Q. What particular part of Thorn, Nevada would they go to?

A. That I do not know.

Q. They would go to a Southern Pacific Company depot, wouldn't they, or yard?

A. They would go to that destination point, but they are on the Southern Pacific tracks.

Q. In other words, they would go from there to make up trains that the Southern Pacific Company would haul freight in, is that right?

A. Wherever they designate the load, they would be loaded out, they would go to that destination.

Q. That is right. So that regardless of what you have got on this piece of paper—by the way, have you ever met this man, Betterton?

A. Yes, sir, I have met him personally.

Q. And where was he at?

A. In the San Francisco office.

Q. Is he an employee of the Southern Pacific Company also?

A. That is correct.

Q. You don't know whether he is telling you where to send these cars as an employee of the Southern Pacific Company staff or the Equipment Company staff?

[fol. 1330] A. Of the Equipment Company staff.

Q. Is it the Equipment Company staff? How do you

know he is not acting as an agent for the Southern Pacific Company?

A. He is acting as agent for the Banking and Trusts and they are shipped by the Southern Pacific Equipment Company to Mr. J. M. Betterton at these various destinations.

Q. Do they go out by written orders?

A. Written orders, yes, a regular commercial waybill or bill of lading.

Q. Then their final point where they arrive, like, say, they arrive at these various towns, from there directed to a yard where they are made up into trains, isn't that it?

Mr. Wulff: If he knows.

A. That I would not know. They are billed to these various locations for loading. From there I do not know where they go.

Mr. Perkins:

Q. Hasn't Mr. Wulff told you what they do with these cars when you get them there, or has anybody told you?

Mr. Wulff: Well,——

The Court: That wouldn't be binding on anybody.

Mr. Perkins: I will withdraw that.

The Court: Wulff may not know.

Mr. Perkins:

Q. But as far as you know they just go to these places and then they just go right out into the service of the S.P., isn't that right?

[fol. 1331] A. They go into service from those locations, yes, to my knowledge.

Q. For the Southern Pacific Company?

Mr. Wulff: You are putting words in his mouth. These cars are T and N O cars.

Mr. Perkins: I am cross examining.

Q. Isn't that true, they go in the Southern Pacific Company's system?

A. Yes, they are used on the Southern Pacific system.

Q. You, of course, are not employed by the Equipment Company, are you?

A. I am employed by the Southern Pacific Company.

Q. Now, I think you mentioned several branches of work under Mr. Wulff's examination that was done in Car Shop 9 as being new cars, old cars, light repairs, and running repairs. How about the remodeling of old cars, do you do that too?

A. We have had a couple of programs at different times, yes.

Q. And whose program is that?

A. That is Southern Pacific Company.

Q. There is no Equipment Company financing the cars?

A. Not on a regular program of old equipment, no.

Q. And, of course, you change the men around from one program to another there, do you?

Mr. Wulff: Same objection, if your Honor please.

The Court: Objection sustained.

Mr. Perkins:

Q. Well, when you finish a program, do you make any switches?

[fol. 1332] Mr. Wulff: That is immaterial.

The Court: Just a minute. That is too general. It does not lead us to any conclusion at all.

Mr. Perkins: All right, your Honor.

The Court: We are trying to stay as much as we can with this particular program and just exactly what is being done.

Mr. Perkins:

Q. Well, what do you call the men in your employ, how do you classify them?

A. Well, there are several classifications. There are carmen, carmen helpers, carmen apprentices, painters, painter's helpers, painter's apprentices, laborers.

Q. And what classification was Mr. Enfrazia?

A. He was an upgraded carman.

Q. And when was he made an upgraded carman?

A. On March 2, 1951.

Q. All right. To be an upgraded carman you have to be qualified to do any work that a carman can do, is that right?

Mr. Wulff: That is immaterial, your Honor.

The Court: Objection is sustained. You have asked that before many times.

Mr. Perkins: I have no further questions.

Mr. Wulff: No further questions. Just one question, please.

Redirect examination.

By Horace B. Wulff, Esq., counsel on behalf of defendant:

Q. All of the 1000 gondola cars were stenciled T and N O, [fol. 1333] were they not?

A. That is correct.

Q. Do you know where these cars went after delivery, in the Southern Pacific Company system or the T and N O system?

A. That I wouldn't know.

Q. So when you testified going to the Southern Pacific system, you were not testifying from your own personal knowledge?

A. That is right.

Mr. Wulff: That is all.

Mr. Perkins: I have one further question, your Honor.

Mr. Wulff: Go ahead.

Recross-examination.

By Thomas C. Perkins, Esq., counsel on behalf of plaintiff:

Q. Isn't it true that you switched a Mr. Fabiano off and on this gondola program?

Mr. Wulff: It is immaterial and incompetent what he did with one employee.

Mr. Perkins:

Q. I mean you would take him off a while and put him on running repairs and then put him back on?

The Court: Are you referring to the plaintiff here?

Mr. Perkins: No, sir, I am referring to a man by the name of Fabiano.

The Court: That has nothing to do with this case.

Mr. Perkins: It would show he could.

The Court: He says he can switch them any place he needs them.

Mr. Wulff: The objection is sustained to that question? [fol. 1334] The Court: Yes.

Mr. Wulff: The objection is sustained. Immaterial, incompetent.

Mr. Perkins: Well, I hate to be repetitious, your Honor. I don't mean to be disrespectful in any way, but I would like to show that he constantly switched these men around, he put them on this conveyor one day, then he would put them on running repairs, then he would put them back, and I think I can prove that.

The Court: Well, are you talking now about within this particular time?

Mr. Perkins: Yes, sir.

The Court: From June until the accident happened?

Mr. Perkins: Yes.

The Court: Well, I will let it go in and see what it leads to.

Mr. Perkins:

Q. Isn't it true that you ordered a man by the name of Fabiano off of this conveyor where he was working and put him onto a repair job?

A. That is not true. That is not true.

Q. You deny that?

A. I do, yes, sir.

Q. Well, just prior to June 13——

The Court: Well, we have confined this to June 13 and July. We are not going back of it. That has been up many times.

Mr. Perkins: Your Honor, I think it is one point that [fol. 1335] needs clarification, that this witness—work was going on before June 13—may I ask this witness what they were doing on June 12, 1951?

A. On June 12, 1951?

Q. Yes.

A. On the same program.

Q. How long had they been on that same program?

A. Since May 1, 1951.

Q. And what were they on before that?

A. They were on what we call an automobile box program.

Q. And then there also they would be working on the ends, isn't that right, Mr. Hitke?

A. It would be the same end assembly at that location, yes.

Q. Well, while that was going on would you deny having taken a man name Fabiano off of that?

Mr. Wulff: Same objection.

The Court: The objection is sustained.

Mr. Perkins:

Q. Off of that job and putting him on running repairs?

Mr. Wulff: Same objection.

The Court: Objection sustained.

Mr. Perkins:

Q. That was new car construction also, wasn't it, this automobile box?

A. That is correct.

Mr. Wulff: Same objection. That is a different program entirely.

The Court: Strike it out.

[fol. 1336] Mr. Wulff: I move to strike it out.

The Court: Strike out the answer.

Mr. Perkins: Oh, I think that is all.

Mr. Wulff: That is all.

The Court: Next witness.

Mr. Wulff: The defendant rest.

The Court: Are you through also?

Mr. Perkins: Well, let's see, can we have a brief recess, your Honor?

The Court: Yes, we will take a short recess, five minutes.

(Recess.)

Mr. Wulff: If your Honor please, there is one thing I left out and I ask permission of the Court to recall Mr. Hitke and just ask him one or two questions. Any objection?

Mr. Perkins: I have no objection, however I have about two more questions I would like to ask Mr. Hitke.

The Court: All right. Wait just a minute. You want to put this on direct examination?

Mr. Wulff: Yes, that is correct.

Mr. Perkins: All right, go ahead.

Redirect examination

By Horace B. Wulff, Esq., counsel on behalf of defendant:

Q. I will show you Plaintiff's Exhibit No. 4 which is introduced in evidence and ask you what that 2807 refers to?

A. The 2807 number on this refers to the special order to which all labor is charged.

[fol. 1337] Q. For the 1000 gondola cars?

A. For the 1000 gondola cars, yes.

Q. In other words, that is a shop number for the program?

A. That is a shop number for the program.

Q. Do you know what the Equipment Company's number is for the 1000 gondola car program?

A. The Southern Pacific Equipment Company's number is P-3061.

Mr. Wulff: That is all, thank you.

Recross-examination.

By Thomas C. Perkins, Esq., counsel on behalf of plaintiff:

Q. And that number there was 2807, is that right?

A. That is correct.

Q. What number does that refer to again; what does this number refer to again?

A. It is the order to which we charge all labor.

Q. Now, you stated, Mr. Hitke, that no man could be switched unless you switched him, is that right?

Mr. Wulff: If your Honor please, that has been asked and answered, immaterial, incompetent. I objected to it and it has been sustained a hundred times.

The Court: Are you referring to during this time?

Mr. Perkins: Yes, sir, during July of 1951.

Q. You stated that a man could only be taken from one job to another on your order, is that right?

A. That is correct.

Q. Well, can't a man bid in to another job without your approval?

[fol. 1338] A. A man can bid to another job, yes, but not as a carman to the new car line or from the new car line to a carman.

Q. Well, as a matter of fact, couldn't he even bid into Car Shop 3 if he wanted to?

A. Yes, yes, he can bid anywhere he wants to that way.

Q. In other words, if a man is on this conveyor——

Mr. Wulff: (Interposing) I can't see the materiality.

The Court: Just a minute.

Mr. Wulff: I object to it.

The Court: I can't rule on anything until I hear what the question is and then the objection.

Mr. Perkins: Well, my question——

The Court: (Interposing) Well, never mind, please. Now, ask your question and then Mr. Wulff, if he wants to make his objection, why it is all right.

Mr. Perkins: Thank you, your Honor.

Q. Isn't it true that a man on the conveyor where Mr. Eufrazia was working in July of 1951 could bid in on a job involving running repairs?

Mr. Wulff: My objection to that, if your Honor please, is that it is immaterial, incompetent. It doesn't make any difference whether he is re-assigned or it is by his own bidding or whether he is re-assigned by the superintendent or general foreman, it is a new assignment.

The Court: You speak about the assembly line where he was working.

[fol. 1339] Well, the testimony was that he was working, as I understand it, independently of the assembly line.

Mr. Perkins: Well, I was referring to this particular conveyor with fourteen or fifteen men on it.

The Court: He wasn't working on that.

Mr. Perkins: Oh, yes, he was working on that.

The Court: That wasn't a conveyor, as I understand it.

Mr. Perkins: It was sort of a table with wheels on it. They call it a conveyor.

A. Where we assemble the ends, then you can push them from one spot to another, and there is rollers on them.

The Court: That isn't the regular assembly line?

A. No.

Mr. Perkins:

Q. But isn't it true that the thing that Mr. Eufrazia was working on was known as the conveyor, don't they call it that?

A. That is right.

Q. Now, isn't it true that a man could bid from that conveyor into a job involving repairs of old equipment if he chose to?

Mr. Wulff: Same objection, if your Honor please.

The Court: Well, I will let it go in to cut this thing a little short. Let him answer the question, if he can.

A. Answer?

The Court: Yes.

A. Yes, it is true that they can bid to any job where their seniority will place them, but that is another new [fol. 1340] assignment when he leaves the particular job that he has been working on.

Mr. Perkins:

Q. Isn't it true that the various foremen would change men from one job to the other without your knowledge but with your approval?

A. No, that is not true.

Q. Do you mean to say that every time that a man was taken from one position to another that it was with your knowledge?

A. That is correct.

Q. Was it at your express direction every time that a man would be changed?

A. I instruct my foremen on the changing of employees from one assignment to another, yes.

Q. So that it would never happen that a man would go to Mr. Fagan and say——

The Court: Well, he has answered your question. Now you start in with it never happened. Never happened when?

Mr. Perkins: Well, in his knowledge, say, in July.

The Court: I am going to sustain that. He has answered the question and told you what the procedure is.

Mr. Perkins:

Q. Isn't it true that Mr. Fagan—by the way, Mr. Fagan was the foreman of Mr. Eufrazia in July, 1951, isn't that correct?

A. On July 10, 1951, yes.

Q. All right. And isn't it true that Mr. Fagan also had a repair gang under his supervision?

A. He had other work under his supervision, yes.

[fol 1341] Q. And that involved repairs, didn't it?

A. Repairs to various equipment, yes.

Q. And isn't it a fact that Mr. Fagan could without telling you but with your approval move a man from this conveyor where Mr. Eufrazia was working to the repairs?

A. No, he wasn't given the privilege of moving any man off of the new car line to other assignments without my authorization.

Q. Well, what if an emergency arose?

The Court: Well, now, just a minute. You say you want to ask one or two questions and now you are going into other details, emergency. Now, if you haven't got something better than that, why, we are all through.

Mr. Perkins: I have one more point.

The Court: I am not going to listen to it unless you tell me it is material and to the point.

Mr. Perkins: I feel, your Honor, that everything I have asked is very material.

The Court: All right, ask another question. You have

got to argue between now and 5:00 o'clock, so you are going to cut your argument short.

Mr. Perkins:

Q. Isn't it true that at times this conveyor would pile up ends, in other words they would get so many ends produced that they didn't need them that day, wouldn't that ever happen?

A. No.

[fol. 1342] Q. That never happened?

A. No.

The Court: That is all. Start with the arguments.

Mr. Perkins: All right. Who do you wish to start?

Mr. Wulff: If your Honor please, in view of the lateness of the evening I would like to brief this matter.

The Court: I will listen to oral arguments and see what the points are. Fifteen minutes to a side.

Mr. Wulff, this Court has so many briefs on its desk here is a few of the things—that we will never reach them with a brief, the way they write them. They give me ten, twenty, fifty pages. We don't get time. I have to read them at home every night. Go ahead.

Mr. Perkins: Who do you wish to start, your Honor?

The Court: You start.

Mr. Perkins: All right.

The Court: It seems to the Court that what the point is and looks like, it may not be as simple as it looks, but it would seem to the Court that what the point is whether or not a man working as the plaintiff was here on new equipment which later on is attached to a gondola car and later on that gondola car moves out under the system of the rails and into interstate commerce is employed in interstate commerce. That is the question it seems to the Court, the only question that is involved. Of course, I am not pretending to tell the attorneys what the points are, but [fol. 1343] it looks to me like that is the point before the Court. I may be wrong.

(Thereupon counsel for the plaintiff and counsel for the defendant presented their arguments to the Court.)

[fol. 1344] Reporter's Certificate to foregoing transcript omitted in printing.

[fols. 1345-1346] In Supreme Court of California, Sacramento County

Sacramento No. 6522

Albert Eufrazia, Plaintiff and Appellant,

vs.

Southern Pacific Co., a Corp., Defendant and Respondent

Hon. Glenn, Judge

For App: Thomas C. Perkins, 801 Ninth Street, Sacramento.

For Resp: Devlin, Diepenbrock & Wulff, 926 "J" Street, Sacramento.

Docket Entries.

July 30, 1954. Transferred to Supreme Court, March 20 '53 Filed Transcript Cl, Rl Appeal from J 5 Mar 20 '53 Lodged exhibits.

August 3, 1954. Lodged Exhibits Pltfs 1 thru 4 Defts A thru L.

Nov. 1, 1954. Ordered on Bank Calendar San Francisco Dec. 6, 1954.

Nov. 24, 1954. Filed So. Pac. Co. memo of oral argument.

Dec. 6, 1954. Causes called. Arthur B. Dunne argued for appellant and respondent Southern Pacific Company in all five cases. Mr. Hildebrand and Mr. Probst argued for respondent Gileo in S.F. 19090. Thomas G. Perkins argued for appellant Eufrazio in SAC 6522. Mr. Colley argued for appellant Moreno in SAC 6520 and for respondent Aranda in SAC 6521. Mr. Sealore waived oral argument for appellant Eelk in SAC 6523. Submissions Deferred.

April 29, 1955. Submitted.

April 29, 1955. By the Court: The judgment is reversed.

May 31, 1955. Remittitur issued.

[fol. 1347] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

ALBERT EUFRAZIA, Plaintiff and Appellant,

v.

SOUTHERN PACIFIC COMPANY, a Corporation, Defendant and Respondent

Sac. 6532

OPINION—April 29, 1955

Plaintiff was injured while employed by defendant railroad company as an advanced carman helper in the construction of parts for new railroad cars, and he brought this action under the Federal Employers' Liability Act. Before trial of the other issues, the court held a hearing on the question of whether the federal act was applicable and concluded that it was not. Judgment was entered accordingly, and plaintiff appeals.

On June 13, 1951, plaintiff, who had worked for defendant during the previous nine months repairing railroad cars already in service, began assembling "ends" for new gondola cars and did this work exclusively until he was injured [fol. 1348] on July 10. When assembled, the "ends" were conveyed to a main assembly line in another part of the shop and were there attached to the cars. The construction project was the same as that involved in Gileo v. Southern Pacific Company, ante, p.——, this day decided, where a welder was injured while working on one of the gondola cars. The factual situations in the two cases are substantially similar, and our decision holding the act applicable to Gileo is controlling here.

The judgment is reversed.

[fol. 1349] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SAC No. 6522

ALBERT EUFRAZIA, Plaintiff and Appellant,

vs.

SOUTHERN PACIFIC COMP . . ., Defendant & Respondent

On Appeal from the Superior Court in and for the County of Sacramento

JUDGMENT—April 29, 1955

The above entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered,

It is ordered, adjudged, and decreed by the court that the Judgment of the Superior Court in and for the County of Sacramento in the above entitled cause, be and the same is hereby reversed.

Appellant to recover costs on appeal.

I, William I. Sullivan, clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 29th day of April, 1955, and now remaining of record in my office.

Witness my hand and the seal of the Court, affixed at my office this 31st day of May, A.D. 1955.

William I. Sullivan, Clerk, by Paul Dinoia, Deputy.
(Seal.)

[fol. 1350] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 1351] IN THE DISTRICT COURT OF APPEAL, STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT

3 Civil No. 8428

ALBERT EUFRAZIA, Plaintiff and Appellant,

v.

SOUTHERN PACIFIC COMPANY, A CORPORATION, Defendant and Respondent

CERTIFICATE OF CLERK

I, L. A. Endrés, Clerk of the District Court of Appeal, State of California, Third Appellate District, do hereby certify as follows:

The above entitled action was appealed to the above entitled Court from the Superior Court of the State of California in and for the County of Sacramento; briefs were thereafter filed in this Court by the parties to said action and said action was, by stipulation of the parties and Order of Court set down for oral argument and was argued before the above entitled Court upon the same day that argument was had in *Roque Aranda v. Southern Pacific Company*, 3 Civil No. 8388, *Epimenio Moreno v. Southern Pacific Company*, 3 Civil No. 8363, and *Charles Eelk v.* [fols.1352-1353] *Southern Pacific Company*, 3 Civil No. 8481. Prior to submission of the above entitled cause and prior to any decision, judgment or opinion by the above entitled Court the above entitled action was, by Order of the Supreme Court of the State of California, transferred to the Supreme Court of the State of California and the file in said action was thereupon transmitted to the Clerk of the Supreme Court of the State of California.

There is no decision or opinion or judgment of the above entitled Court in the above entitled cause.

Witness my hand and the seal of the Court this 21st day of June, 1955.

L. A. Endres, Clerk of the District Court of Appeal, State of California, Third Appellate District.

[fols. 1354-1355] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SACRAMENTO

No. 87156

CHARLES EELK, Plaintiff and Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, Defendant and Respondent

Clerk's Transcript on Appeal

Appeal from the Judgment of the Superior Court of the State of California in and for the County of Sacramento
Hon. John Quincy Brown, Judge

APPEARANCES:

Anthony J. Scalora, 521 Oehsner Building, Sacramento 14, California, Counsel for Plaintiff and Appellant.

Devlin, Diepenbrock & Wulff, 1212 Calif. State Life Bldg., Sacramento 14, California, Counsel for Defendant and Respondent.

[fol. 1356] IN SUPERION COURT OF SACRAMENTO COUNTY

COMPLAINT FOR DAMAGES—Filed July 6, 1951

Plaintiff complains of defendant, Southern Pacific Company, a corporation, and for cause of action alleges:

I

That at all times herein mentioned defendant was and now is a duly organized and existing corporation doing business in the State of California and other states and that said defendant was at all times herein mentioned and now is engaged in the business of a common carrier by railroad in interstate commerce in said State of California and other states.

II

That at all times herein mentioned defendant was a common carrier by railroad engaged in interstate commerce

and plaintiff was employed by defendant in such interstate commerce, and the accident complained of arose while plaintiff and defendant were engaged in the conduct of interstate commerce.

III

That this action is brought under and by virtue of the provisions of the Federal Employers' Liability Act, 45 U.S.C.A. 51; et seq.

IV

That on or about the 22nd day of June, 1951, at or about the hour of nine o'clock a.m. thereof, plaintiff was employed by defendant as a helper, bucketing rivets, in defendant's car shop on the property of defendant in the City of Sacramento, County of Sacramento, State of California.

[fol. 1357]

V

That at said time and place, acting in the regular course and scope of his duties as helper, bucketing rivets, plaintiff was engaged in removing broken rivets from one of defendant's cars; that at said time and place defendant, acting by and through its agents, servants and employees other than plaintiff, carelessly and negligently handled and manipulated said car; that at said time and place and as a direct and proximate result of said carelessness and negligence the said car was caused to move and did strike plaintiff and plaintiff was thereby caused to and did receive the personal injuries hereinafter enumerated.

VI

That by reason of the facts hereinabove set forth and as a direct and proximate result thereof, plaintiff was rendered sick, sore, lame, disabled and disordered, both internally and externally, and received the following personal injuries, to-wit: severe injuries to the internal organs; that plaintiff is informed and believes and alleges upon such information and belief that the injuries sustained by him will be permanent.

VII

That at the time of the happening of the accident herein alleged, plaintiff was a strong and able bodied man

capable of earning and earning the sum of approximately Two Hundred and Fifty Dollars ($250) per month; that by reason of the facts hereinabove alleged and the in- [fol. 1358] juries proximately caused plaintiff thereby, plaintiff is now, and since the date of said accident by reason of injuries sustained, unable to perform his regular duties; that plaintiff will be for an indefinite period of time in his future unable to perform his regular duties, all to his damage in a sum as yet unascertainable, and that when said sum is ascertained, plaintiff will pray leave of court to insert said sum as the reasonable value of said loss of services.

VIII

That by reason of the facts hereinabove set forth and as a direct and proximate result thereof as aforesaid, plaintiff has been generally damaged in the sum of one hundred thousand dollars ($100,000.00).

Wherefore, plaintiff prays judgment against defendant in the sum of one hundred thousand dollars ($100,000.00), together with such special damages as may be hereafter ascertained, and for his costs of suit incurred herein.

As and for a second, further, separate and distinct cause of action against defendant Southern Pacific Company, a corporation, defendant alleges as follows:

I

Plaintiff refers to Paragraphs I, II, III, and IV of the First Cause of Action and by reference thereto incorporates the same herein with the same force and effect as though set out at length and in full herein.

II

That at said time and place, acting in the regular course [fol. 1359] and scope of his duties as helper, bucketing rivets, plaintiff was engaged in removing broken rivets from one of defendant's cars; that at said time and place defendant, acting by and through its agents, servants and employees other than plaintiff, carelessly and negligently failed to provide plaintiff with a safe place to work; that as a direct and proximate result of said carelessness and

negligence, plaintiff was struck by the said car and plaintiff was thereby caused to and did receive the personal injuries hereinafter enumerated.

III

Plaintiff refers to Paragraphs VI, VII, and VIII of the First Cause of Action and by reference thereto incorporates the same herein with the same force and effect as though set out at length in full herein.

Wherefore, plaintiff prays judgment against defendant in the sum of one hundred thousand dollars ($100,000.00), together with such special damages as may be hereafter ascertained, and for his costs of suit incurred herein.

As and for a third, further separate and distinct cause of action against defendant Southern Pacific Company, a corporation, defendant alleges as follows:

I

Plaintiff refers to Paragraphs I, II, III, and IV of the First Cause of Action and by reference thereto incorporates the same herein with the same force and effect as though set out at length and in full herein.

II

[fol. 1360] That at said time and place, acting in the regular course and scope of his duties as helper, bucketing rivets, plaintiff was engaged in removing broken rivets from one of defendant's cars; that at said time and place defendant, acting by and through its agents, servants and employees other than plaintiff, carelessly and negligently handled and manipulated said car; that at said time and place and as a direct and proximate result of said carelessness and negligence the said car was caused to move and did strike plaintiff and plaintiff was thereby caused to and did receive the personal injuries hereinafter enumerated; that said personal injuries, each and every, all and singular, were the direct and proximate result of the defect or insufficiency, due to the carelessness and negligence of defendant acting by and through its agents, servants, and employees other than plaintiff at said time and place, in its appliances, machinery, or other equipment.

III

Plaintifff refers to Paragraphs VI, VII and VIII of the First Cause of Action and by reference thereto incorporates the same herein with the same force and effect as though set out at length and in full herein.

Wherefore, plaintiff prays judgment against defendant in the sum of one hundred thousand dollars ($100,000.00), together with such special damages as may be hereafter ascertained, and for his costs of suit incurred herein.

[fol. 1361] [File endorsement omitted.]

[fol. 1362] IN SUPERIOR COURT OF SACRAMENTO COUNTY

ANSWER—Filed Aug. 15, 1951

Now comes the Southern Pacific Company, a corporation, the defendant above named, and answering the first alleged cause of action set forth in the complaint of plaintiff on file herein admits, denies and alleges as follows, to-wit:

I

Denies each and every, all and singular, the allegations set forth in Paragraphs II, V, VI, VII and VIII and in further answer to said first alleged cause of action defendant ave ; that at all times mentioned in said first alleged cause of action the plaintiff was employed as a carman's helper and was engaged exclusively in working upon new railroad car construction.

Answering the second alleged cause of action set forth in said complaint of plaintiff on file herein, this defendant admits, denies and alleges as follows, to-wit:

I

Denies each and every, all and singular, the allegations set forth in Paragraph VI of the first alleged cause of action and/or as adopted by reference by Paragraph I of

the second alleged cause of action set forth in plaintiff's said complaint.

II

Denies each and every, all and singular, the allegations set forth in Paragraphs II and III and in further answer to said Paragraphs II and III, the defendant avers that at all times mentioned in said second alleged cause of action [fol. 1363] the plaintiff was employed as a carman's helper and was engaged exclusively in working upon new railroad car construction.

Answering the third alleged cause of action set forth in said complaint of plaintiff on file herein, this defendant admits, denies and alleges as follows, to-wit:

I

Denies each and every, all and singular, the allegations set forth in Paragraph II of the first alleged cause of action and/or as adopted by reference by Paragraph I of the third alleged cause of action set forth in plaintiff's said complaint.

II

Denies each and every, all and singular the allegations set forth in Paragraphs II and III and in further answer to said Paragraphs II and III the defendant avers that at all times mentioned in said third alleged cause of action the plaintiff was employed as a carman's helper and was engaged exclusively in working upon new railroad car construction.

As and for a second, further and separate defense to the alleged cause of action set forth in said complaint, and without prejudice to the defense hereinabove set forth, defendant avers:

That at the time and place mentioned in said complaint on file herein, plaintiff so negligently and carelessly conducted himself in and about his work as a carman's helper so as to cause himself to be struck by a moving railroad car and that all injuries and/or damages suffered by plaintiff were caused and contributed to by said negligence [fol. 1364] and carelessness of plaintiff.

As and for a third, further and separate defense to the alleged cause of action set forth in said complaint, and without prejudice to the defense hereinabove set forth, defendant avers:

That at the time and place mentioned in said complaint on file herein, plaintiff so negligently and carelessly conducted himself in and about his work as a carman's helper so as to cause himself to be struck by a moving railroad car and that the sole proximate cause of any and all injuries and/or damages suffered by plaintiff was the said negligence and carelessness of said plaintiff.

Wherefore, defendant prays that plaintiff take nothing by his said complaint, and that it be hence dismissed and defendant recover its costs of suit herein incurred.

Dated: August 9, 1951.

(S.) Devlin, Diepenbrock & Wulff, Attorneys for Defendant.

[fol. 1365] *Duly sworn to by Roy G. Hillebrand. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 1366] IN SUPERIOR COURT OF SACRAMENTO COUNTY

MEMORANDUM OPINION

This is a suit brought by the Plaintiff against the defendant company, his employer, for damages alleged to have been sustained by plaintiff due to negligence of the defendant. The matter was set for trial before this Court, but before proceeding with the jury trial, it was stipulated that the Court should first hear and determine the question of whether or not the Federal Employers' Liability Act was applicable. In other words, if this act is applicable, then the plaintiff may sue in the Superior Court. If, however, the Federal Act is not applicable, the plaintiff must be governed by the Workmen's Compensation Act and the

matter heard before the Industrial Accident Commission of the State of California.

The Court heard evidence with regard to this issue, sitting without a jury pursuant to said stipulation. This point has been before this Court many times. In a case decided by the writer hereof, *Arranda vs. Southern Pacific Co., Sacramento County Court No. 87250,* wherein the Memorandum Opinion was filed on February 15, 1952, the writer held that the facts of that case showed that the plaintiff was engaged in repairing rather than manufacturing, as was contended by the defendant. Accordingly, this Court in that case held that the Superior Court had jurisdiction for the purposes of trial.

In most of the cases there is just a sufficient factual difference to place each case in an individual twilight zone.

However, a recent case in the Superior Court of Sacra- [fol. 1367] mento County, *Albert Eufrazia, plaintiff, vs. Southern Pacific Co., a Corporation, defendant, No. 90452,* an identical case factually with the case at bar, has just been decided by Honorable Malcolm C. Glenn, the Memorandum Opinion having been filed December 31, 1952. The facts in that case are identical with those in the instant matter. This Court has had ample opportunity to study the cases cited by both counsel in every exhaustive and informative briefs. It would serve no useful purpose here for this Court to write an opinion identical with that of Judge Glenn, and since this Court is in accord with Judge Glenn's opinion, it will adopt that opinion for all purposes in regard to the instant case. That opinion, we quote as follows:

"The question presented to the Court is whether or not the plaintiff who was injured while working for the Southern Pacific Co. on ends to be placed on gondolas, is entitled to bring a suit for this alleged damages under the Federal Employers' Liability Act, or whether his remedy is under the California Workmen's Compensation Act.

The question arises mainly by reason of the amendment of the Federal Employers' Liability Act passed in 1939. There is no question but that provisions thereof have broadened the scope of those who may come within its

terms; however, it has been definitely determined that not all employees working for a railroad and who are injured may claim the right to bring suit thereunder.

The facts are not in serious dispute. Therefore, it will not be necessary to make reference thereto to any great extent. The Southern Pacific Co. had entered upon a large [fol. 1368] expansion program, among which was the acquisition of one thousand gondola cars. These cars were being assembled or fabricated in Car Shop 9 of the S. P. Co. for the Southern Pacific Equipment Co. (hereafter referred to as the SPEC.)

In order to finance the plan of expansion, various contracts and obligations were necessary to be entered into.

The Southern Pacific Equipment Co. is a subsidiary of the S. P. Co. It is wholly owned by said Company, but with a different Board of Directors. It will be noted also that these gondolas are stenciled "T & NO", which stands for Texas and New Orleans R.R. Co., another subsidiary of the S. P. Co.

The financial company is the Pennsylvania Company for Banking and Trusts, Trustee. These matters are all set forth in defendant's Exhibit "F".

While the SPEC and T & NO R.R. Co. are subsidiaries of the S. P. Co., they are not, strictly speaking, the alter ego of the latter railroad company. There is no question but that the entire scheme for the S. P. Co. acquiring additional equipment was a legitimate project, and the various companies mentioned above were necessary, or at least desirable, in order to work out a plan of financing the program of expansion. In this regard reference is made to the cases of Cleaning and Pressing Co. vs. Hollywood L. Service, 217 Cal. 124, 129, Erkenbrecher vs. Grant, 187 Cal. 7, 11.

Plaintiff had been assigned to work in car shop nine as a reamer on the ends of the gondola cars. He was injured while so working on July 10th, 1952, a period of a little less than a month after his assignment.

[fol. 1369] The Federal Employers' Liability Act was amended in 1939, which greatly broadened the scope of those working for the various railroad companies who may bring suit under the provisions of said act.

The case is important to both sides. The question whether or not an employee of a railroad comes within its provisions is one of law; and this is true even though the facts may be in dispute. (Scarborough vs. Penn. Railroad, 32 A 2d. 603.)

The question presented raises the jurisdictional point whether the federal act applies or the injured workman or his family, if he happened to be killed, shall make claim under the provisions of the Workmen's Compensation Act? According to the decided cases involving this question, there is no alternative, even though the employee or the employer or both wish to proceed under the one or the other. The facts determine the remedy. Therefore, it may be, as existed in one of the cases cited by plaintiff, the workman so injured had secured an award under the Workmen's Compensation Act, but the employer, railroad, attacked the jurisdiction of the board making the award; and the Federal Court reversed the award and held that the Federal Act applied. (Scarborough vs. Penn. Ry. Co., 35 A 2D, 603.)

It will be noted that if it be ultimately held, as several of the cases cited by plaintiff hold, that all employees of railroads engaged in interstate commerce come within the provisions of the Federal Act, then the provisions of the Workmen's Compensation Act of this state becomes a dead letter so far as they are concerned. In other words, under such a theory, such employees who may be injured will be [fol. 1370] deprived of the benefits of the provisions of said Workmen's Compensation Act.

The statement of one or two courts to the effect that *all employees of such railroad* come within the provisions of the Federal Act was probably inadvertently made, or made without careful study of the act after amendment, *for the majority of the cases not only hold to the contrary, but such a determination would make the Federal Act as vulnerable to attack from a constitutional standpoint as it was in its first enactment.*

There are really two aspects to this case: First, What was plaintiff doing at the time of the accident in his work in Car Shop 9? Second: Was this a temporary employment, so that the Court may consider his job prior to such employment or assignment to Car Shop 9?

First: Plaintiff was working as a reamer on ends to be attached to the gondolas. The SPEC was employing the S. P. Co. to assemble the cars. It was entirely new construction. True these cars were eventually to become a part of its own system, but the method of financing the program of expansion was through two subsidiary corporations, and through a financing company. The S. P. Co. only acquired a lease to the gondolas, which would ripen into a title when the underlying certificates were paid to the financing company.

It is deemed unimportant so far as the matter of financing the program of extension is concerned, except so far as the facts show that the employees of Car Shop 9 were engaged in new construction of assembling or fabricating material for the building of the gondola cars for SPEC. [fol. 1371] If plaintiff is entitled to maintain a suit under the Federal Act for his injury, then it would seem to the Court, that we must hold that even the men who work on the material first delivered to Car Shop 9, before any fabrication was started, would be entitled to bring suit under such act, if injured. We might go even further, and, for like reasons, come to the conclusion that those who drew the plans for the construction of the gondolas would, in case of injury, be forced to bring suit therefor under the Federal Act. But it is the view of this Court that there can be no such holding as will appear hereafter.

Advertising now to some of the principal cases after the amendment of the Act, while there still appears to be some uncertainty in the minds of some Courts under the facts in the individual case, there appears to be no dissent where there is new construction, particularly under facts somewhat parallel to those of the instant case, from the holding that the Federal Act does not apply.

Let us first take the Erickson case, (39 A C 385): That case, strongly relied upon plaintiff clearly distinguishes between new construction and the facts of the case itself. In this regard it is stated: "(3) It has been held that work on new tracks not yet in service is not covered by the act." Citing Moser vs. Union Pac. R. Co., 65 Idaho 479; 147 P 2d, 336, 153 ALR 341. With this statement the Court has in effect approved the holding in the case cited. Turning to

the case cited, which contains a long and careful analysis of innumerable decisions both before and after the amendment of the Federal Act, in 1939, we find the following:

[fol. 1372] "While, at least prior to the 1939 amendment, a railroad employee engaged in new construction, as distinguished from repair or maintenance work, was generally held not to be engaged in interstate commerce with the puryiew of the Federal act, the courts by no means agreed as to the tests by which to ascertain whether a certain activity constituted new construction or repair (maintenance) work. As stated in Gulf, M. & N. R. Co. v. Madden (1949) 190 Miss 374, 200 So 119, the difficulty consisted in applying the distinction between new construction and repair or maintenance work to a given state of facts.

As in other instances, such a distinction is easily drawn in clear-cut cases; where a new instrumentality is to be erected for future use in interstate commerce and the work is carried out far away from any instrumentality then in existence and used at that time for interstate commerce, as where the first railroad is constructed through a certain territory, the work is undoubtedly to be classified as new construction work. Conversely, where an instrumentality that, at the time of work, is being used in interstate commerce, is maintained in an effective condition by taking care of its existing parts and without adding new applicances, as where loose spikes in ties are tightened while the road is being used in interstate commerce, the work is as clearly to be classified as repair or maintenance work.

The difficulties arise from situations in the 'twilight zone,' in which the work is concerned at the same time with new appliances or structures which, though intended to be [fol. 1373] used in interstate commerce, have not yet been so used at the time of the accident, and also with instrumentalities then in existence, which at that time are actually being used in interstate commerce. As to these situations the courts have recognized that it is sometimes difficult to draw the line of demarcation between construction work and repair or maintenance work. See, for instance, Oregon Short Line R. Co. v. Gubler, (1925); (CCA 8th) 9 F 9d 494 (writ of certiorari denied in (1926) 273 US 709, 71 L ed 851, 47 S Ct 100); Wallace v. New York, N.H. & H.R. Co.

(1923) 99 Conn 404, 121 A 878; Ross v. Sheldon (1916) 176 Iowa 618, 154 NW 499; Boyer v. Pennsylvania R. Co. (1927) 91 Pa Super Ct 307.

Since it is impossible to reconcile the inconsistent classifications made by the courts in the doubtful situation just described, the courts have held that each case must be decided in the light of its own peculiar facts. Wallace v. New York, N.H. & H. R. Co. (1923) 99 Conn 404, 121 A 878; Moser v. Union P. R. Co. (Idaho) (reported herewith) ante, 341; Lewis v. Cleveland, C. C. & St. L. R. Co. (1926) 240 Ill App 332.

Stating that the line between new construction and repair or maintenance work is sometimes difficult to draw and is, in reality, one of degree rather than of real difference, the court in Wallace v. New York, N.H. & H. R. Co. (1923) 99 Conn 404; 121 A 878, said: 'No hard and fast rule can be devised by applying which we can automatically place a given case in new construction column, or in the repair and maintenance column. Each case must be decided upon its [fol. 1374] own facts. Some will be so clear as to classify themselves, but the majority of the contested cases will range themselves not far from the border line between these two classes of cases.'

Attempts have also been made to describe in abstract language the line of demarcation. 'Whatever may be necessary to keep the subsisting railway, its structures and equipment, in a safe state for interstate traffic, or to maintain it in that state and improve the state, may be said to be an act of repair, which commonly embraces not only restoration but also renovation or renewal by any process of making good, strengthening, supplying, or mending. Century Dictionary, "repair"; Inglis v. Buttery (1878) LR 3 App Cas (Eng) 552, 565, 579—HL. In those instances where difficulty arises in determining whether labor or betterment upon an interstate line of railway is new construction work or repair and maintenance, the trend of decisions indicates that the doubt should be resolved in favor of the latter conclusion.' Boyer v. Pennsylvania R. Co. (1932) 162 Md 328, 159 A 909. To the same effect is Ross v. Sheldon (1916) 176 Iowa 618, 154 NW 499.

'It is common knowledge that railroad bridges are

repaired by replacement of parts thereof, and frequently by the erection of new bridges, and at the same time commerce is carried on thereover without interruption. The erection of new parts or of a new bridge, under these conditions, is clearly the repair of the old bridge, and the fact that the old bridge is being used while the repairs are being made does not take it out of the use of the railway company in its duty as a common carrier of interstate [fol. 1375] commerce.' State v. Bates & R. Constr. Co. (1916) 91 Wash 181, 157 p 482.

'A careful study of the authorities called to our attention has convinced us that the dividing line between the two classes of cases is whether the construction is an original construction never having been dedicated to interstate commerce; or whether it is the repair, rebuilding, replacement, or enlargement of an interstate instrumentality after it has been so characterized by use. The question is not whether the instrumentality, when repaired, reconstructed, or enlarged, is entirely made of new material or of a new design or of a larger size, but whether or not it is still the original instrumentality, repaired, reconstructed or enlarged, retaining the same location and existing for the same purpose. Repairs may be made by replacing an instrumentality in whole or in part so long as the purpose is to remedy a defect or supply an insufficiency. The object of enlarging the turntable was to supply a deficiency; therefore the rebuilding of it belongs to the operations designated as repairs when distinguished from original constructions.' Lombardo v. Pittsburgh & L.E.R. Co. (1827) 91 Pa Super Ct 307."

Looking at the amendment to the act it will be noted that it contains these provisions: "Any employee of a carrier, any part of whose duties shall be furtherance of interstate commerce or foreign trade; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purpose of this chapter, be considered as being entitled to the benefits of this chapter." [fol. 1376] So far as the first clause is concerned, it would seem quite clear that making new equipment for another corporation, although employed by the S. P. Co., cannot be said to be duties in furtherance of interstate or foreign com-

merce. New construction has nothing to do with commerce. Does such work fall within the provisions of the second clause of the amendment? Does it in any way directly or closely and substantially affect such commerce?

Plaintiff was engaged in new construction work; the material was purchased by SPEC and delivered to the S. P. Co. by whom plaintiff was employed. Of course the fabrication of the gondolas, under such circumstances, had nothing to do with commerce, of any kind. Plaintiff's work was finished and completed when the gondolas were delivered or shipped by SPEC to its consignors.

Does the fact that new construction work such as involved herein, bring one who works thereon within the provisions of the Federal Act? The only argument which can be made in the affirmative is to claim that after the assembling or fabrication of the gondolas they were immediately placed on the S. P. Co. tracks for transportation to points outside of the State of California, and that the assembling of these parts with the immediate shipment by rail over the S. P. Co. lines does closely and substantially affect such commerce.

Thus, the activity of plaintiff must affect or produce some effect or influence on interstate commerce. The only work plaintiff does can have no possible influence of effect on commerce. His work is finished before the gondolas are [fol. 1377] turned over to the SPEC for shipment. Where equipment, such as engines and other rolling stock is brought in for repair, the men who work thereon affect interstate commerce, because the work they are doing is in furtherance thereof and which affects the same; the same is true of switchmen because they are handling interstate commerce traffic, and under the 1939 amendment they need not be so handling the same at the moment of an accident whereby such switchmen was injured.

It is true that the amendment must be given a liberal construction in favor of the employees, but this does not justify an interpretation which does violence to the apparent intent of the wording of the act itself.

Second: Plaintiff makes the claim that prior to his assignment to Car Shop 9, he was working in interstate commerce; that he was only temporarily assigned to the work

in Car Shop 9; that he was liable to be called by the S. P. Co. at any time to do his work in which he formerly was engaged, and hence when he was injured he was still privileged to sue under the provisions of the Federal act.

The facts which were developed at the hearing showed that there was nothing said about whether the work in Car Shop 9 was to be merely temporary or more or less permanent. There was no testimony in the case, nor any intimation, that plaintiff was to be withdrawn from his employment of reaming ends of the gondolas. The expansion program required the construction of 1000 gondola cars, together with other cars which are not particularly involved in this proceeding. If we examine the photographs [fol. 1378] introduced in evidence as to the activities in Car Shop 9 in assembling these gondola cars, we note that it is a very large and continuous project. When the work started on the assembling of these gondolas does not appear; but there is an agreement which is dated September 29th, 1950, between the SPEC and the S.P. Co. in regard to the construction of the program of expansion. (Deft. Exhibit B) In defendant's Exhibit K, it refers to an order for 380 of the gondola cars, which appears to be the first order made for the payment to be made thereon. From the surrounding circumstances it may be a long time before all of these gondola cars are completed. How long, whether months or several years, was not disclosed by the evidence, so far as the Court can recall.

Plaintiff relies upon the case of Scarborough vs. Penn. R. Co., supra, which held that even though he was not working in interstate commerce at the time of his injury, he may still claim the privileges of the act, as above noted. The case is in no way parallel in its factual aspects with the case at bar. The injured employee was regularly employed as a signalman. For some weeks he had been employed in installing new station lights, and was so employed at the time of the accident. The Court points out that both employments came within the provisions of the Federal Employers' Liability Act. In the course of the opinion the Court states: ". . . if any part of the employee's duties (at the time of his injury or death) directly, closely, or substantially affected interstate or foreign commerce, the

claimant would be considered entitled to the benefit of the act. The preponderance of service performed by railroad employees is interstate commerce. As to those who are con- [fol. 1379] stantly shifting from one class of service to another, the adoption of the amendment will provide uniform treatment in the event of injury or death while so employed." In quoting this portion of the amendment no intimation is intended that it is only where there is a shifting of employees so stated which is covered by the amended act; but that is one provision which has been definitely settled in favor of the employee.

In view of the foregoing, it is concluded that plaintiff must seek his remedy within the provisions of the California Workmen's Compensation Act, and not under the Federal Employers' Liability Act.

Dated: Dec. 31, 1952

Malcolm C. Glenn, Judge of the Superior Court."

This Court wishes to again emphasize the point that if the FELA be so construed that the words, "shall in any way directly or closely and substantially affect such commerce. . ." shall mean that all employees of railroads engaged in interstate commerce come within the provisions of the Federal Act, then this would render nugatory the provisions of the Workmen's Compensation Act of this state, and this Court would have grave doubts as to the constitutionality of the FELA if so interpreted.

It should be remarked that nearly all of these cases are in this twilight zone heretofore remarked by this Court. True, there may be great difficulties in determining where repair stops and manufacture begins, and true, there may be difficulties in determining where manufacture stops and some form of transit begins, and true, there may be diffi- [fol. 1380] culties in determining where manufacture stops and some form of transit begins, but in this case it seems to this Court that we have clearly a manufacturing case here. For, the reasons above stated, and the reasoning adopted in the Enfrazia case, supra, this Court is of the opinion that the Plaintiff has not brought his case within the terms of the Federal Act, and that the Superior Court has no jurisdiction for the purposes of trial.

Let the necessary order be prepared in accordance herewith.

Dated: February 9th, 1953.

(S.) John Quincy Brown, Judge of the Superior Court.

[File endorsement omitted.]

[fol. 1381] IN SUPERIOR COURT OF SACRAMENTO COUNTY

FINDINGS OF FACT AND CONCLUSIONS OF LAW—March 10, 1953

Defendant's answer to the complaint of plaintiff having set up the defense that at all times and places mentioned in the complaint the defendant was not engaged then and there as a common carrier by railroad in interstate or any commerce, and also the defense that at said time and place the plaintiff was not employed by the defendant in interstate or any commerce, and that the accident complained of did not arise while plaintiff and defendant were, or either of them was, engaged in the conduct of interstate or any commerce, and pursuant to Section 597 of the Code of Civil Procedure, and upon stipulation of the parties the Court having proceeded to the trial of this special issue or defense before the trial of the merits of the plaintiff's alleged cause of action, Honorable John Quincy Brown presiding, a jury having been waived by the respective parties, and the plaintiff appearing personally and by his attorney, Anthony J. Scalora, Esq., and the defendant Southern Pacific Company appearing by its attorneys, Messrs. Dunne, Dunne & Phelps and Messrs. Devlin, Diepenbrock & Wulff, and evidence both oral and documentary having been adduced, and this special issue or defense having been argued, briefed and submitted, the Court now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I

[fol. 1382] That at all times mentioned in the complaint, the defendant, Southern Pacific Company, was and now is

a corporation duly organized and existing under the laws of the State of Delaware, and doing business in the State of California; that at all times and places mentioned in said complaint, the defendant was engaged solely in the manufacturing of new railroad freight cars and was not engaging in transportation of in interstate or any commerce, as a railroad or as a common or any carrier, or otherwise.

II

That on the 22nd day of June, 1951, and at all times mentioned in said complaint, plaintiff was employed by defendant solely in the manufacturing of new railroad freight cars then and there being built by the Southern Pacific Equipment Company under a contract of sale to a third person; and that pursuant to the terms of a written contract between defendant and Southern Pacific Equipment Company, the defendant was to provide all necessary shop facilities and labor for the construction and manufacture of new railroad freight cars and upon the completion of the manufacture thereof, the same were to be delivered by said Southern Pacific Equipment Company to the third party purchaser.

III

That at all times mentioned in said complaint, no part of plaintiff's duties as an employee were the furtherance of interstate or foreign commerce or did in any way directly or closely and/or substantially affect such commerce.

[fol. 1383] CONCLUSIONS OF LAW

As Conclusions of Law from the above and foregoing Facts, the Court holds as follows:

I

That the above entitled Court has no jurisdiction over the subject matter of the above entitled action and that plaintiff's sole remedy is under the provisions of the Workmen's Compensation Act of the State of California.

II

That plaintiff take nothing by his complaint and that defendant do have judgment against plaintiff and recover its costs of suit herein incurred.

Dated: March 10, 1953.

(S.). John Quincy Brown, Judge of the Superior Court.

[File endorsement omitted.]

[fol. 1384] IN SUPERIOR COURT OF SACRAMENTO COUNTY

JUDGMENT—March 10, 1953

Defendant's answer to the complaint of plaintiff having set up the defense that at all times and places mentioned in the complaint the defendant was not engaged then and there as a common carrier by railroad in interstate or any commerce, and also the defense that at said time and place the plaintiff was not employed by the defendant in interstate or any commerce, and that the accident complained of did not arise while plaintiff and defendant were, or either of them was, engaged in the conduct of interstate or any commerce, and pursuant to Section 597 of the Code of Civil Procedure, and upon stipulation of the parties the Court having proceeded to the trial of this special issue or defense before the trial of the merits of the plaintiff's alleged cause of action, Honorable John Quincy Brown presiding, a jury having been waived by the respective parties, and the plaintiff appearing personally and by his attorney, Anthony J. Scalora, Esq., and the defendant Southern Pacific Company appearing by its attorneys, Messrs. Dunne, Dunne & Phelps and Messrs. Devlin, Diepenbrock & Wulff, and evidence both oral and documentary having been adduced, and this special issue or defense having been argued, briefed and submitted, and pursuant to the order of the Court, Findings of Fact and Conclusions of Law having been heretofore prepared and proposed by the defendant, which said proposed findings were duly served upon the attorn[illegible] for

plaintiff, and there being no amendments proposed within the time allowed by law, or at all, and the Court having [fol. 1385] heretofore made and filed in writing its Findings of Fact and Conclusions of Law, and directing that judgment be entered in accordance therewith;

Now, therefore, it is Ordered and Adjudged as follows, to-wit:

1. That the plaintiff take nothing by his said action and that said action be, and the same is, hereby disinissed.

2. That the defendant do have and recover its costs of suit against said plaintiff, taxed in the sum of————.

Dated: March 10, 1953.

(S.) John Quincy Brown, Judge of the Superior Court.

[File endorsement omitted.]

[fol. 1386] In Superior Court of Sacramento County

Notice of Appeal—Filed April 29, 1953

To the Clerk of the above-entitled Court and to Southern Pacific Company, a Corporation, and to Messrs. Devlin, Diepenbrock & Wulff, its Attorneys:

You will please take notice that the plaintiff hereby appeals to the District Court of Appeal of the State of California, Third Appellate District, from the judgment therein entered in the said Superior Court on the 10th day of March, 1953 in favor of the defendant and against the said plaintiff, and from the whole thereof.

Dated this 28th day of April, 1953.

(S.) Anthony J. Scalora, Attorney for Plaintiff.

Affidavit of Service (Omitted in Printing)

[fol. 1387] [File endorsement omitted.]

[fol. 1388] IN SUPERIOR COURT OF SACRAMENTO COUNTY

NOTICE TO CLERK TO PREPARE TRANSCRIPT ON APPEAL—Filed June 2, 1953

To the Clerk of the above-entitled Court:

You will please take notice that Charles Eelk, plantiff in the above-entitled action, has appealed to the District Court of Appeal of the State of California in and for the Third Appellate District from that certain judgment rendered on the 10th day of March, 1953 in favor of the defendant above named and said plaintiff hereby requests that a clerk's transcript and a transcript of the testimony offered or received and all rulings, acts or statements of the court and also all objections or exceptions of counsel and all matters to which the same relate and all requests by any of the parties to the above-entitled action whether given or refused be made up and prepared.

Dated: June 2, 1953

(S.) Anthony J. Scalora, Attorney for Plaintiff.

[File endorsement omitted.]

[fols. 1389-1390] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 1391-1393] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SACRAMENTO

No. 87156

Department Number 5 Hon. John Quincy Brown, Judge.

CHARLES EELK, Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, A CORPORATION, Defendant.

REPORTER'S TRANSCRIPT OF TESTIMONY GIVEN AND PROCEEDINGS HAD UPON HEARING.

APPEARANCES:

For the Plaintiff: Anthony J. Scalora, Esq., Ochsner Building, Sacramento, California.

For the Defendant: Arthur B. Dunne, Esq., 333 Montgomery Street, San Francisco, California, and Horace B. Wulff, Esq., California State Life Building, Sacramento, California.

[fol. 1394] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SACRAMENTO

No. 87156—Dept. 5

CHARLES EELK, Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, Defendant

Thursday, June 12, 1952

The hearing of the above entitled cause was commenced at 10:00 o'clock in the forenoon before Hon. John Quincy Brown, Judge of the Superior Court in and for the State of California. The plaintiff, Charles Eelk, was represented by Anthony J. Scalora, Esq. The defendant was re-re-

sented by Arthur B. Dunne, Esq., and Horace B. Wulff, Esq.

The following proceedings were had, to wit:

Mr. Wulff: If your Honor please, I would like to have an order first associating Mr. Dunne for the defendant.

The Court: Very well, that will be the order. This is Charles Eelk vs. Southern Pacific Company?

Mr. Wulff: Yes.

Mr. Scalora: Yes. Now, your Honor, for the purposes of the record I think we can all agree and understand that this is a procedure unusual in nature in that the burden of [fol. 1395] coming forward rests upon Mr. Eelk, who is the plaintiff in this action, and yet it is under the unusual circumstance where the evidence which we must present rests entirely within the witnesses that belong to the officers, agents, directors of the company corporation here.

The Court: As I understand this, this is a matter to be heard as a special issue before the Court without a Jury preliminary to a question as to whether the trial of the proceeding should go forth with a jury.

Mr. Scalora: That is correct. Now, your Honor, for the record I wish to state at this time that any witnesses called on behalf of Mr. Eelk are to be regarded and we ask the Court to regard all of them as being adverse and hostile witnesses within the meaning of section 2055. We are calling all witnesses here who are agents, directors and officers of the defendant corporation within the meaning of 2055.

The Court: Well, the only practical situation there would be whether or not you would be bound by their answers, and obviously this is a case where there is a factual situation to be determined first and then on those facts there is a legal matter to be determined by the Court, I assume whether or not this court has jurisdiction is the issue first, isn't it?

Mr. Wulff: That is correct.

Mr. Scalora: And our position, your Honor, is that we cannot call any witnesses to present this question to this Court except those who under 2055 are described as being [fol. 1396] agents, directors and officers of the adverse party, and under 2055 such witnesses are described to be

those types of witnesses that the plaintiff is not bound by their testimony.

Mr. Wulff: We have no controversy with that.

Mr. Dunne: The situation is perfectly plain.

The Court: Yes. I was going to say that I do not know what the issue is there. The section is plain, and I assume they will be agents of the defendant.

Mr. Scalora: The next thing for the record, would the Court ask counsel representing the corporation to read into the record all those agents, directors and officers of the corporation who are now presently in attendance in this courtroom for the reason that all of these matters as you can well understand, this is a mere employee of that gigantic corporation——

The Court: (Interposing) Counsel, this is not the time for argument of the case.

Mr. Scalora: No, I am not arguing the case. I am merely asking that those persons who are present here in this courtroom——

The Court: (Interposing) What do you want done with them?

Mr. Scalora: That their names be read into the record so that I will know who we can call here as a witness.

The Court: How did they get here?

Mr. Scalora: They are produced on behalf of the corporation through Mr. Wulff and Mr. Dunne.

Mr. Dunne: They were subpoenaed.

[fol. 1397] The Court: Haven't you subpoenaed them?

Mr. Scalora: I have subpoenaed some, your Honor.

The Court: You certainly know their names.

Mr. Wulff: We have people here who may not even be witnesses. I am not going to——

The Court: (Interposing) I think it is premature here; I do not know what will develop. Certainly if there are any parties in court that you want recognized to reappear—is that the idea?

Mr. Scalora: No, that is not my idea at all, your Honor. It is going to develop here, and I think we should proceed orderly, it is going to develop here that San Francisco is the home site of the California corporation of the Southern Pacific Company which has been incorporated in Dela-

ware, that the offices located in Sacramento receive all of their orders directly from San Francisco and that they do not possess all of the necessary knowledge and information which this court must have in order to determine what the facts are to make its legal ruling.

The Court: This court is not partisan in this matter one way or the other. This court is sitting as a court and it is up to you to put on your proof. I do not know what it is going to be.

Mr. Scalora: My proof, your Honor, has to be the agents and directors and officers.

The Court: All right. I do not know what the point is.

[fol. 1398] Mr. Scalora: As my first witness under 2055 I would like to call the president of the Southern Pacific Corporation located at San Francisco, California, if he is present in this courtroom.

Mr. Dunne: He is not present.

The Court: He is not present.

Mr. Scalora: I would like to call the vice-president of said corporation if he is present.

Mr. Dunne: No vice-president.

Mr. Scalora: Then I would like to call next as a witness under 2055 any executive, manager or agent or director or officer of the Southern Pacific Company who has offices in the City of San Francisco if he is present in this courtroom.

Mr. Dunne: That demand is much too broad for us to interpret. Now, if Counsel will tell us what information he wants, we will supply the information. If he wants to know where to begin, if he will tell us what he wants, we will stipulate to it or if there is a man here who can testify to it, we will produce him; if it is a document, we will produce the document, but this request hasn't been made on us before, so that I am entirely in the dark as to what Counsel wants.

Mr. Scalora: I am only asking for those persons right now in this courtroom who are agents, directors or officers of the Southern Pacific Corporation and who are working out of San Francisco and not Sacramento.

The Court: I see before me some dozen gentlemen out here.

[fol. 1399] Mr. Scalora: That is correct.

The Court: And I have no idea who they are.

Mr. Scalora: Of which, your Honor, I have subpoenaed some four or five who are Sacramento agents, officers or directors. The other remaining group are San Francisco officers, agents or directors whom I do not know, who are present in this courtroom, and they can give vital testimony. Now, I would like this——

The Court: (Interposing) Are you just asking Counsel now to give you the answer to a question whether or not there are any agents in court at this time out of the San Francisco office?

Mr. Scalora: That is correct, of the Southern Pacific Corporation.

The Court: He can answer that.

Mr. Dunne: There are three men here from the Accounting Department of the Southern Pacific Equipment Company.

The Court: You have no objection, I presume, to giving Counsel their names?

Mr. Scalora: That is what I would like to have in the record so they can be called as witnesses.

The Court: I do not think it is necessary to put it in the record. It is a matter for you to obtain to put on your case, and if Counsel gives it to you, well and good.

Mr. Dunne: Mr. Maurer.

The Court: It seems to me this all should have been done before you take up the Court's time.

[fol. 1400] Mr. Dunne: And Mr. Johnson and Mr. Barlow. Now, Mr. Barlow is in the office of the auditor of payrolls. Mr. Maurer is from the Department—I do not know that I described it absolutely accurately—of Corporate Accounts Bureau, and Mr. Barlow is the supervising accounting auditor of disbursements.

The Court: Is Mr. Janes in court?

Mr. Wulff: No.

Mr. Scalora: Is Mr. Vance in court?

Mr. Dunne: Yes, Mr. Vance is here.

Mr. Scalora: Will Mr. Vance step forward, please, and be sworn as a witness?

(Herbert G. Vance was then called as a witness for cross examination on behalf of the Plaintiff herein, under sec-

tion 2055 of the Code of Civil Procedure of the State of California.)

Testimony of HERBERT G. VANCE, witness produced on behalf of the Plaintiff herein, under the provisions of section 2055 of the Code of Civil Procedure of the State of California, sworn.

Cross-examination.

By Anthony J. Scalora, Esq., counsel on behalf of the Plaintiff herein:

Q. Mr. Vance, would you state your full name, please?

A. Herbert Glenn Vance.

Q. And what is your business or occupation?

A. Superintendent of Shops, General Shops, Sacramento.

[fol. 1401] Q. All right. Now, for the record could you tell us just exactly what is a superintendent of the general shops?

A. Superintendent of the General Shops directs the orders and the work of the supervisors and employees in those general shops.

Q. How many shops do you supervise?

A. I don't supervise shops. I supervise the supervisors who in turn supervise the shop.

Q. Is there any person superior to you here in Sacramento?

A. Yes, sir.

Q. Who is that person?

A. Mr. F. E. Russell and Mr. E. F. Malloy, the superintendent of motor power, Northern District, and assistant superintendent of motor power, Northern District.

Q. Where do they maintain their offices?

A. In Sacramento, in the Administration Building.

Q. All right. Now, where are your offices located?

A. In the Administration Building.

Q. In the City of Sacramento?

A. In the City of Sacramento.

Q. How long have you been employed in that capacity?

A. Since June 16, 1946.

Q. Where do you receive your orders?

A. I receive my orders through Mr. Russell's office.

Q. And how do you receive them?

A. Through written orders and verbal.

[fol. 1402] Q. And do you receive them from him personally?

A. Sometimes.

Q. When you don't receive them from him personally how do you get your orders?

A. I get them through the assistant superintendent.

Q. And that would be Malloy?

A. Mr. Malloy.

Q. Now, you stated you received verbal orders, is that correct?

A. That is correct.

Q. Now, these orders that you receive, they are always in connection with the work that you as superintendent of the General Shops have to supervise, is that correct?

A. They are directives as to what the program is and what has to be done.

Q. Now, when you say program, what work are you referring to now?

A. Well, we have several programs. One particularly is building new cars.

Q. Is that all your Southern Pacific Corporation does?

A. The Southern Pacific Corporation does many jobs. We build cars, new cars, we repair cars, we repair locomotives, both steam and diesel, numerous other items, manufacture.

Q. Don't you ever move any merchandise on trucks?

A. The Transportation Department does that.

Q. Well, in other words, then if I understand you correctly now, the Southern Pacific Corporation was incor-

[fol. 1403] porated in the State of Delaware, is that correct?

Mr. Wulff: Do you know?

A. I can't answer that.

Mr. Scalora: Q. You have no knowledge of that?

A. I have knowledge, but not——

Mr. Wulff: That stands admitted, your Honor.

The Court: Is that admitted in the answer?

Mr. Wulff: Yes.

The Court: Mr. Scalora, I think it would be helpful here if you would give the Court a rather thumbnail sketch of the issue here which is presented so we will not have to inquire as to the entire duties of the Southern Pacific Company.

Mr. Scalora: Well, your Honor, this is——

The Court: What are the allegations? I have not had an opportunity to read this file here.

Mr. Scalora: We have filed a complaint under the Federal Employers Liability Act in which we allege and maintain, that Southern Pacific Corporation is a corporation incorporated for the purpose of engaging in transportation of freight, merchandise and passengers for hire, that that is the principal and sole reason for its incorporation; that the said plaintiff in this case, Charles Eelk, was an employee of the Southern Pacific Company corporation in the Sacramento yards here in Sacramento and that while engaged in his duty as a carman's helper, that the said corporation did at that time while engaged in duties which were connected with or substantially affecting the [fol. 1404] purpose and scope of the incorporation of said corporation, which namely is transportation, that the said Charles Eelk at that time was engaged in a work which substantially affected directly or closely the movement in interstate commerce either merchandise or passengers for hire, and at the said time and place through the negligence of its agents, the said Charles Eelk was injured.

The Court: Those are all general allegations. What I want to get at is, what is the specific issue here, whether a carman's helper acting as the plaintiff is alleged to have acted at this time was actually engaged in interstate commerce?

Mr. Scalora: That probably is the contention of the defense.

The Court: Don't you think this inquiry should be limited somewhat to whether or not that is true?

Mr. Scalora: Well, your Honor, I have done quite a bit of work in the field of research on this particular question——

The Court: Counsel, don't argue the matter now. Can't

you give me a specific answer to my question? Can't we confine this here now to the issue of whether or not the plaintiff while doing a certain type of work was or was not in interstate commerce?

Mr. Scalora: That is what my question is confined to.

The Court: Well, you have asked him questions here that go to the entire work done by the Southern Pacific Railroad. We will be here a month if you go into that.

[fol. 1405] Mr. Scalora: Well, your Honor, that is specifically the thing that the presiding judge had in mind when this particular proceeding was instituted here, this special proceeding, and that is the particular point that was made by the Supreme Court of California.

The Court: Proceed, Counsel, proceed.

Mr. Scalora: That this is that type of——

The Court: (Interposing) Proceed.

Mr. Scalora: Q. Now, as an actual fact Southern Pacific Corporation has been incorporated as a common carrier, isn't that a fact?

The Court: Well, is that admitted?

Mr. Dunne: It is. Southern Pacific Corporation is a Delaware corporation. It is authorized under its charter to engage in transportation for hire as a common carrier freight and/or passengers, it is authorized too in the State of California. It also engages in intrastate commerce. It engages in other businesses, but as far as its transportation business is concerned it complies with the requirements of the Public Utilities Act, files its reports and tariffs with the State Railroad Commission, and the same is true of its obligations under the Interstate Commerce Commission and files all necessary papers with the Interstate Commerce Commission.

The Court: There is no issue on that?

Mr. Scalora: I don't agree with that at all.

The Court: Don't agree with what?

[fol. 1406] Mr. Scalora: The statement made by Counsel. I claim that the Southern Pacific Corporation was incorporated by the State of Delaware for the sole purpose of engaging in transportation as a common carrier of passengers for hire and merchandise.

The Court: Well, Counsel, I do not think this witness could qualify to answer those questions anyway. He is

the superintendent of shops. What does he know about the charter of the Southern Pacific Corporation in Delaware?

Mr. Scalora: This witness was trying to show that the cards here——

The Court: (Interposing) Counsel, do not argue with me please. I have stated what the Court feels about this case for you to adapt yourself to.

Mr. Scalora: Your Honor, I am not trying to argue with you. I am trying to point out——

The Court: Just cease then. Go ahead with your case, but the matters you just asked him are not in issue. They are admitted. Southern Pacific Company is a common carrier and that they engage in transportation of passengers and freight in interstate commerce—they do not admit that, do they, that wholly and exclusively?

Mr. Wulff: Do other businesses of other types?

The Court: Obviously this witness can't answer that.

Mr. Scalora: If they are incorporated for transportation——

The Court: The articles of incorporation would be the best evidence of it.

[fol. 1407] Mr. Scalora: I know, but they have filed an answer here in which they concede that. Now, the incidental manufacture, your Honor——

The Court: (Interposing) Counsel, let's proceed. When I want argument I will ask you for it.

Mr. Scalora: Q. Now, Mr. Vance, who is in charge of Car Shop 9?

A. Mr. H. J. Heike, General Foreman.

Q. Now, what does Car Shop 9 engage in?

A. Car Shop 9 engages in building new cars, in repairing cars.

Q. And only that?

A. They engage in repairing parts that go in the cars.

Q. Do they repair engines, for example?

A. No, sir.

Q. Do they repair parts of engines?

A. Occasionally they repair parts of engines, that is they fabricate parts that work in connection with the engines.

Q. In the course of a year have you any knowledge actu-

ally how many cars, used cars that is, not new cars, go through the Sacramento yards?

Mr. Wulff: Just a minute. If your Honor please, I don't know what he means by the Sacramento Yards. Sacramento Yards and Sacramento Shops are two separate and distinct things.

Mr. Scalora: Q. Have you any information as to how many passenger cars and how many freight cars?

A. I do not have that information.

Q. Do you have any information as to how many freight [fol. 1408] cars and passenger cars are repaired in Car Shop 9 in the course of a year?

A. I would have to refer to the records for that.

Q. Do you have any information as to how many new cars are constructed in Car Shop 9 in the course of a year?

A. We have a record of all the cars that are rebuilt, new cars that are built in Car Shop 9.

Q. Where do you keep those records?

A. We keep them in the office. I think they can be obtained here in court.

Q. Then an actual record is kept on the total number of cars constructed as well as the number of cars that are repaired in Car Shop 9?

A. The total number of cars that are built, our record is kept of them, yes, sir.

Q. But not on the number that are repaired?

A. Yes, sir, a record is kept of those that are repaired.

Q. All right. Now, how many employees do you have in Car Shop 9?

A. Over six hundred.

Q. And how many of those employees are used on construction of new cars?

A. That depends on the number of cars that we are building. At the present we have over two hundred on new cars.

Q. That would mean then that four hundred men are used on repairing old cars?

A. Again that depends on the amount of work that is [fol. 1409] there to be done.

Q. Do your records, to your knowledge and to your ex-

perience, ever show the use of more than thirty or forty per cent of the men on new construction in Car Shop 9?

A. Yes, sir.

Q. And when in particular do you know as a fact that Southern Pacific Corporation at Car Shop 9 employed more than thirty or forty per cent of the men in Car Shop 9 on new construction?

A. Well, in June of 1950 we had some 312 on new construction.

Q. And how many men were working in Car Shop 9 in June of 1950?

A. Around 600.

Q. So, roughly speaking, it would be approximately fifty per cent, is that correct?

The Court: Well, that speaks for itself.

Mr. Scalora: Q. How many men were engaged in July of 1950?

A. Approximately the same number.

The Court: When did this accident happen?

Mr. Wulff: June 22, 1950, your Honor.

The Court: 1951?

Mr. Wulff: 1951, I beg your pardon.

The Court: You are talking about a year before this happened, at this time?

Mr. Dunne: That is correct.

A. That is a correction there on my part. It was 1951 I had reference to.

The Court: Did you mean 1951 when you said June, 1950?

[fol. 1410] A. I meant at the time of the accident. It was June, 1951, that is right.

Mr. Scalora: Well, Mr. Vance, what did you do, did you go look at a record to get that information?

A. We have records available at all times for that information.

Q. Mr. Vance, now you in particular volunteered the date of June, 1951. Now, it so happens that Mr. Eelk was injured in June 1951. Did you go and actually look up a record at any time before coming in court today to deter-

mine that percentage figure of the total number of employees?

A. We keep those records constantly in our file and naturally we look them up from time to time.

Q. Fine. Can you tell me this then, do you know how many men were engaged in new car construction on August 27, 1951?

A. Approximatey the same number.

Q. Three hundred and twelve. You are not sure of the exact number though?

The Court: What is the relevancy of that?

Mr. Scalora: Well, your Honor, apparently the number 312, he referred to a particular record——

The Court: (Interposing) Why did you pick out August 27th, I don't understand that.

Mr. Scalora: Just to show, your Honor, that he couldn't give you the specific number on that date and yet he can for June of 1951 because he looked at a record and knows what the exact number was being used.

[fol. 1411] Mr. Dunne: If your Honor please, we keep payroll records. We can give you the number of people working any particular day he wants, and if he wants any particular number of people working, let us know what he wants and we will furnish that information. I don't think any witness carries that in mind. That is why we maintain records.

A. Those are approximate figures. I think I made myself clear on the approximation in the first place.

Mr. Scalora: Q. Mr. Vance, do you actually keep a record that shows you the type of work each employee in Car Shop 9 is engaged in?

A. There is a record available, yes, sir.

Q. In other words then you know for a fact on the six hundred and some odd employees that you have in Car Shop 9, you can go over your records for every day for every employee employed by Southern Pacific Corporation and tell whether they are engaged on repair work, working on new cars or working on parts of cars?

A. Yes, sir.

Q. You have records that have that particular notation, is that correct?

A. Yes, sir.

Q. What type of a record is that?

A. His daily time card.

Q. What does it say on the daily time card to indicate to you that this man would be working——

A. (Interposing) It shows exactly what he is working on.

Q. How is it listed?

A. It is listed by the job that covers the job he is working on.

[fol. 1412] Q. Yes.

A. It is a job order.

Q. When you refer to this job order, where do you get that particular order?

A. That comes originally from San Francisco to Mr. Brown's office, the general superintendent of motor power and directed to Mr. Russell, superintendent of motor power, Northern District, and then comes to my office and is sent out to the general foreman.

Q. Now, Mr. Vance, the six hundred and some odd employees that work in Car Shop 9, are they assigned a particular job and kept on that particular job?

A. Yes, sir.

Q. In other words, now, if Mr. Heike, the foreman of Car Shop 9, if he suddenly needed four of five carmen's helpers and by the job order record it shows those men are working on new construction, he can't go out and pick those men up and move them over where he wants them?

A. He has the right to regulate his force as he sees fit to best suit the service.

Q. That means this, since they are engaged in repair work, renovating work, as well as new construction work in Car Shop 9, any employee in Car Shop 9 is at any time subject to being moved on any particular job the foreman of the shop wants to put him on?

A. I wouldn't say so, no, because that wouldn't be the practice to do that. However, we don't limit the foreman to [fol. 1413] moving men in his gang from one to the job that is more urgently needed. However, on our new construction work we never take the men off unless there is some interference with the work.

Q. You say you never take a man off of new construction work?

A. Not unless there is some interruption in the line.

Q. That applies for every man in Car Shop 9 who is working on new construction work?

A. That is correct.

Q. That means that he stays solely on new construction work?

A. That is correct unless there is an interruption in the line.

Q. How many times a day do you visit Car Shop 9?

A. I don't visit it every day.

Q. How often do you visit Car Shop 9?

A. Frequently, whenever the opportunity presents itself for me to go down there. I don't just recall how many times, but I will say frequent visits.

Q. Well, when you say frequent, would you say that you manage to get down to Car Shop 9 four or five times each week?

A. No, I wouldn't say that frequent.

Q. Would you say four or five times in a month?

A. I would only have to estimate that. Sometimes I go oftener, sometimes I go oftener some months than I do in other months, and that same thing applies to weekly visits.

Q. And on the occasions that you do go down there, you go there to observe whether the employees are being assigned a specific task and kept to that task, is that correct?

[fol. 1414] A. I go down there for the general over-all picture.

Q. Well, in particular, Mr. Vance, prior to the date did you ever have personal knowledge that Charles Eelk, from what you had seen on your visits to Car Shop 9, was employed by Southern Pacific Corporation?

A. I knew that Charles Eelk, a Charles Eelk was employed by the Southern Pacific Company.

Q. Did you ever see him working in Car Shop 9?

A. I may have seen him.

Q. But you don't know?

A. I don't recall.

Q. Do you know if he ever engaged in work on rebuilding old freight cars?

A. I understand that he did work on the repairs to the freight cars.

The Court: It seems to me that should be limited to some reasonable point of time, somewhere near the time at issue. In other words, if he did that ten years ago I don't think it would be relevant.

Mr. Scalora: Q. Well, Mr. Vance, as a car man's helper——

The Court: (Interposing) Let's see if we cannot confine this to somewhere near the 22nd of June, 1951.

Mr. Scalora: Q. Can you tell us of your own knowledge at what time or the last time that you know of that Mr. Eelk was engaged in work of repairing, renovating these freight cars that would become worn and need repair work on them?

A. This would only be an estimate on my part, but I un- [fol. 1415] derstand he worked on repairs to cars at some period. Now, I can't say offhand just what the period was, but he did work for a period. Just what period it was I don't know.

Q. Then his job was not one where they assigned him to the task of working on new construction alone?

A. Yes, his job, he was assigned to new construction, his final assignment.

Q. How was he able to work on used freight cars?

A. We have interruptions sometimes on our new car program that requires the gang to be taken intact, that is, we move the gang over, we try to move the gang over intact on repairs to prevent laying the employees off.

Q. Well then that means that Mr. Eelk was one of that group that would be used whenever the occasion arose to work on old cars for repair as well as new construction?

A. No, I wouldn't say that. Mr. Eelk, if and when he is assigned to new car construction would stay on that new car construction unless some interruption in the line, such as material stoppage would cause the entire gang or portions of the gang to be moved over, that is his gang or whatever other gang was involved.

Q. Let's get back to the date of June, 1951 when this accident happened. Isn't it a fact that you had an order for the construction of 1500 gondola cars?

A. We had an order for the construction of several hundred gondola cars.

[fol. 1416] Q. Wasn't it fifteen hundred?

A. I don't recall the exact figures.

Q. Wasn't it also a fact you were constructing those cars, manufacturing those cars for the State of Nevada?

A. We were building new cars for the Equipment Company, the Southern Pacific Equipment Company.

Q. Wasn't that the T. & N. O. Railroad?

A. No, sir.

The Court: What railroad, Counsel?

Mr. Scalora: The T. & N. O. Railroad.

Q. Isn't it a fact that in 1951, June, Car Shop 9 was engaged in construction of new gondola cars for shipment to Nevada to the T. & N. O. Railroad?

A. I can't say that. I have no knowledge of anything like that. All I know is that we were building these new cars for the Southern Pacific Equipment Company.

Q. All right. Where are they located?

A. They are a concern. I don't know where they are located.

Q. You have no idea where they are located?

A. I do not.

Q. All right. Let's go to this. Those gondola cars after you completed them in your yards, Mr. Vance what did you do, what did you do with those gondola cars?

A. We billed them out to the places that we were directed to bill them to.

Q. Tell us where you billed them to?

[fol. 1417] Mr. Wulff: What are you referring to, what time, what cars?

Mr. Scalora: The 1500 gondola cars being constructed in and around the time of June, 1951?

The Court: He has not said he knows there were 1500.

A. I have no knowledge of that.

Mr. Scalora: Q. You admitted that you had an order for several hundred anyway?

A. That is right.

Q. And that was at the time of June, 1951, when this man was injured?

A. That is right.

Q. All right. Where did you bill those cars to?

A. I have no knowledge of that.

Q. You mean you didn't know they were going out of the State of California to the State of Nevada?

A. I knew that they were being built for some point and were being billed to some point, but I never interested myself to find out what point they were being billed to.

Q. Now, Mr. Vance, isn't it an actual fact that the Southern Pacific Corporation in Sacramento manufactured the cars, the new gondola cars and sold those cars to a corporation out of the State of California and that the Southern Pacific Corporation here in Sacramento transported those gondola cars with its own trains and train crews from Sacramento, California, to a destination point in the State of Nevada?

A. All that I know is that we built new cars for the Equipment Company.

[fol. 1418] Q. Did you ever see any trust receipt or mortgage placed on these new gondola cars as they were being built?

A. Yes, sir, they are stenciled on the car.

Q. Now, tell me this, who was the title holder?

A. I don't know. I can't answer that.

Q. Certainly it wasn't Southern Pacific Corporation?

A. I can't answer that.

Q. You never tried to find that out, did you, Mr. Vance?

A. I never interested myself in that particular angle of it.

Q. But you do have records, for example, that will tell you who the title holder on those cars is?

A. Yes, sir.

Q. In other words, the Southern Pacific Corporation was manufacturing a piece of merchandise in the Sacramento Yards for a corporation other than Southern Pacific Corporation, isn't that correct?

The Court: He used the term Southern Pacific Corporation. Do you mean Southern Pacific Company, a corporation? That is the title.

Mr. Scalora: All right, Southern Pacific Company, a corporation.

The Court: I say, do you mean that?

Mr. Scalora: Apparently so, yes sir.

The Court: Because that is the way it is set up here. I think that is the name of the company.

[fol. 1419] Mr. Wulff: That is the correct name, Southern Pacific Company.

Mr. Scalora: A corporation, yes, sir.

Mr. Wulff: A corporation. It is not part of the name.

The Court: Southern Pacific Company.

Mr. Scalora: Would you read the last question back, please, Mr. Reporter, and where I used the word Southern Pacific Corporation would you insert Southern Pacific Company, a corporation, and make it the same question?

(Thereupon the question was read by the reporter as follows:

"Question: In other words, the Southern Pacific Corporation, a corporation, was manufacturing a piece of merchandise in the Sacramento Yards for a corporation other than Southern Pacific Company, a corporation, isn't that correct?")

A. The Southern Pacific Company is engaged in building new cars for the Southern Pacific Equipment Company.

Mr. Scalora: Q. Which is a separate entity, isn't that correct?

Mr. Wulff: Yes, that is correct. We stipulate to that.

A. That is correct.

Mr. Scalora: Q. Yes. And that separate entity is located out of the State of California?

Mr. Dunne: No. I will give you the information.

A. I can't answer that question.

[fol. 1420] Mr. Wulff: Do you want the information, Sir?

Mr. Dunne: Do you want the information?

Mr. Scalora: No, I will rest with the witness. We can get all this later, Mr. Vance.

Q. You said that there was a trust receipt or a mortgage placed on each of these cars?

A. Not on each one of the cars, no. On gondolas that go to the different trust concerns.

Q. Now, isn't it a fact that in addition to the trust receipt and in addition to the mortgage plate that was on the car, didn't you also have an order for shipment for a point of destination of each of those cars in which part of your orders you had to see to it that Southern Pacific personnel in the Sacramento Yards would ship those particular gondola cars?

Mr. Wulff: If your Honor please, he keeps referring to the Sacramento Yards. We are not concerned in this case with the Sacramento Yards. There is no such thing as that. We refer to them as Sacramento Shops.

Mr. Scalora: The question refers then to Sacramento Shops.

The Court: Do you want to amend it to refer to Sacramento Shops?

Mr. Scalora: Substitute the word "Shops" for "Yards" as used in the last question.

Mr. Dunne: Do you understand that last question?

A. Read that last question to me again, please.

(Thereupon the question was read by the reporter as follows:

[fol. 1421] "Question: Now, isn't it a fact that in addition to the trust receipt and in addition to the mortgage plate that was on the car, didn't you also have an order for shipment for a point of destination of each of those cars in which part of your orders you had to see to it that Southern Pacific personnel in the Sacramento Shops would ship those particular gondola cars?")

A. We had orders where to bill the cars, yes, sir.

Mr. Scalora: Q. You don't remember where that order read to?

A. No, sir, for that I would have to refer to the records.

Q. Now, as a car was completed in Car Shop 9, what track was it set out on?

A. I can't answer that question.

Q. How many cars would be completed before any train crews, engine crews and Southern Pacific Company, a corporation, equipment would move those particular cars out of the Sacramento Shops?

A. I can't answer that question.

Q. How many cars did you build a day?

Mr. Wulff: When? What are you talking about now?

Mr. Scalora: During the period in and around June of 1951.

A. We were building eighteen gondola cars a day.

Mr. Scalora: Q. And how many of them would you accumulate in your yards or shops before you would move them out?

A. That depends on the yard. I can't answer that question.

[fol. 1422] Q. What is the highest number you would accumulate before you would haul them out?

A. The Southern Pacific Shops doesn't haul them out. We turn them over to the Yard. They do the hauling.

Q. To the Yard?

A. To the Transportation Department.

Q. Located here in the General Shops at Sacramento?

A. No, it is a separate division.

Q. Yes, it is a separate division, but isn't it part of Southern Pacific Company, a corporation, right here in Sacramento?

A. It is a part of Southern Pacific Company, yes, sir, but we don't have control of that angle of it. We just build the cars.

Q. When you say we don't have control——

A. Well, I mean the Southern Pacific Company general shops.

Q. Yes, but Southern Pacific Company of San Francisco, the head corporation, has control over it, hasn't it?

A. That is right.

Q. And they can give you an order through Mr. Russell and tell you the cars that are built in Car Shop 9, move them out to transportation yard and have transportation yard send those cars up to Nevada, isn't that a fact?

A. That is right, we bill—now, just a minute. Let me get this thing clear. I can't tell you where they are going to be billed to until we get the order, but we do bill the cars out, [fol. 1423] if that will clarify the question.

Q. All right. Let's get back to this Equipment Company that you mention. Where is that located?

The Court: What do you men, where is it located?

Mr. Scalora: I want to know just geographically where that Equipment Company is located.

The Court: You mean the principal place of business or its activities or what?

Mr. Scalora: Yes, I would like to first know where its principal place of business is.

The Court: First, is it a corporation? Do you know whether it is incorporated?

A. I can't answer that question. I don't know from my own knowledge just where it is located.

Mr. Scalora: Q. Is it located in California or any part of its business located in California?

A. Its operation I presume is in California, that is some of the operating units.

Q. Are some of those operating units located in the State of Nevada?

A. That I don't know.

Q. Let me ask you this, do you know if the Equipment Company that you just referred to pays the Southern Pacific Corporation for the gondola cars that are manufactured by Southern Pacific?

A. That is my understanding. We get paid for that.

Q. All right. Tell me this, do you know if Southern [fol. 1424] Pacific Corporation pays a California sales tax on those gondola cars that it sells after it manufactures them?

The Court: Do you mean Southern Pacific Company?

Mr. Scalora: A corporation.

The Court: That is no part of its name.

A. I can't answer that question. I don't know anything about it. I presume that they pay their taxes.

Mr. Scalora: Q. To your knowledge you don't know?

Mr. Wulff: I move to strike out the presumption.

Mr. Scalora: All along the man has been answering with presumptions.

The Court: That is what I say, he does not know these things. That is why I say we are taking up time.

Mr. Wulff: May we have a ruling on that, your Honor?

The Court: Yes, that may go out.

Mr. Scalora: Q: Mr. Vance, who to your knowledge in Southern Pacific Company, a corporation, either in Sacramento or San Francisco would know the answers to these things?

A. Oh, I think the San Francisco office would know the answer to them.

Q. Could you give us the name of any person in San Francisco that would have that information?

A. Well, Mr. Brown's office would have it certainly.

Q. Mr. Brown?

A. Yes, General Superintendent of Motor Power.

Q. And would Mr. Jennings of Sacramento have that information?

[fol. 1425] A. I don't know. Mr. Jennings is a Division officer.

Q. Do you know who the chief legal counsel for Southern Pacific Company, a corporation, in San Francisco is?

A. No, sir.

The Court: I imagine these gentlemen will stipulate who that is.

Mr. Dunne: Do you want to know who it is?

Mr. Scalora: Yes.

Mr. Dunne: Mr. George Buhler, Vice-President and General Counsel.

Mr. Scalora: Q. Now, let me ask you this, if you know, does Southern Pacific, a corporation, in Sacramento when the transportation yard hauls gondola cars out of the Sacramento yards, does it pay a use tax on those cars in the State of California?

Mr. Wulff: If your Honor please, I submit the witness knows nothing about this.

Mr. Scalora: I asked him.

A. I know nothing about it.

Mr. Scalora: I asked him if he knew.

The Court: Well, he said he did not.

Mr. Scalora: Q. How many tracks do you have in the Sacramento yards?

Mr. Dunne: Now, yards or shops?

Mr. Scalora: Q. Well, do you consider the station a part of the shop?

A. No, Sir.

[fol. 1426] Q. You understand me when I ask you how many tracks you have in the yards?

A. I didn't understand you, no.

The Court: Well, apparently this is preliminary. There is nothing before the Court now in order to determine what the difference between the yards and shops is, but apparently they are two different things.

Mr. Scalora: Well, Judge, certainly we know that the tracks don't run through the shops.

The Court: All we know is what the witnesses tell us, Counsel.

Mr. Scalora: All I asked was how many tracks they maintain in the Sacramento yards. Is that ambiguous?

The Court: Apparently it is.

Mr. Dunne: Yes.

Mr. Scalora: Q. How many railroad tracks do you have on your property, the Southern Pacific Company, a corporation, in Sacramento?

A. I wouldn't be able to tell you.

The Court: It seems to me, Counsel, this is going far afield. We do not know how much property the Southern Pacific Company owns in Sacramento. That takes in maybe dozens of square miles, I would think.

Mr. Scalora: Q. Do you know if any of the gondola cars, do you know if they are brought back to the Sacramento shops again and made a part of your entire freight system that you have in the Sacramento shops?

A. If they happen to have to come in for repairs they [fol. 1427] may come to the shops.

Q. Just if they happen to come in for repairs?

The Court: Are you talking about new cars now? I assume the only relevancy of this is whether or not this has to do with the gondola cars that were made on or near June,

1951. Are you talking about whether or not some of those new cars eventually come back here as old cars?

Mr. Scalora: No, Judge, what I am trying to find out is, cars are built by Southern Pacific Company, a corporation, here in Sacramento, and then they are shipped to a point of destination, and do those same cars return through these shops and through these tracks here in Sacramento later on with merchandise and freight as part of Southern Pacific Company, a corporation, equipment being used regularly over the State of California lines through Sacramento?

The Court: Your question is pretty compound. I am not sure I understand it myself. Is there any issue here as to whether or not a brand new gondola car is a type of freight car? It is, I understand, isn't it?

Mr. Scalora: Yes, sir.

The Court: Is there any question but what that car after it is manufactured here and sent on its way may not engage in what we call interstate commerce, that is run on tracks of other states as well as on tracks in California; I mean, is that an issue?

Mr. Dunne: No, after they are shipped out, they are [fol. 1428] shipped to a receiving point and at the receiving point possession taken by the purchaser and thereafter through several steps, technical legal steps, they are then put in service as railroad cars, entered into general service whatever it may be.

The Court: On what particular line would they be, the new owner's lines?

Mr. Dunne: Well now, I am being very careful in stating this, your Honor, because counsel on the other side evidently doesn't want to get this information from us or get it by way of stipulation, so that if he wants it we will give him that information. What actually happens is that they go into service as cars on the line to which they are assigned. Counsel evidently knows this. These particular cars, gondola cars that were built in June of 1951 were assigned to and went into service as T. & N. O. cars, Texas and New Orleans Railroad Company, a Texas corporation.

The Court: Well, as I understand it he does not want to accept that stipulation even if that were made in the form of a stipulation, is that right?

Mr. Scalora: Well, I will take that stipulation but I don't want to be bound by it. If I may explain to the Court, my legal theory is this, that when they were hauling these new gondola cars from California to the T. & N. O., a foreign corporation, I want to show that the engines and crews of Southern Pacific Company, a corporation, in Sacramento transported those cars and at that moment they were en- [fol. 1429] gaged in transportation of merchandise in foreign and interstate commerce. That is my key point. There is no case in federal courts or state courts that has ever decided that particular point, and that is why I wish to bring all of this out, not through necessarily a stipulation, I want it to be in this record here and I would like to get the particular witnesses that can answer that.

The Court: Why not ask this witness whether he can answer that type of question in advance?

A. I can advise counsel Mr. Hitke is the man that he ought to be putting those questions to.

The Court: Mr. Vance, do you know what happens to these particular gondola cars after you finish them and after they are taken out by the transportation company?

A. No, sir.

The Court: That answers it.

Mr. Scalora: I won't ask any further questions of this witness.

The Court: I do not want to curtail you.

Mr. Scalora: Counsel has—the witness has indicated we can get all of this material through Mr. Hitke.

Mr. Dunne: I just want to ask Mr. Vance one or two questions.

Redirect examination.

By Arthur B. Dunne, Esq., of counsel on behalf of the defendant:

Q. As far as departmental divisions of Southern Pacific Company are concerned general shops are separate from [fol. 1430] the Sacramento Division, are they not?

A. That is correct.

Q. And the Sacramento Division is the part of the trans-

portation activities that encompasses the city and stations and yards at Sacramento?

A. That is correct.

Q. In other words, you don't report to Mr. Jennings, the superintendent of the Sacramento Division?

A. That is correct.

Q. And he doesn't, on the other hand, report to you?

A. That is correct.

Q. There are two distinct chains of command between the Division and the General Shops meeting only when they get up at the top executive level?

A. That is correct.

Mr. Dunne: I have no further questions.

Mr. Scalora: It is all one corporation, however.

Mr. Dunne: Oh, yes, no question about that, Counsel.

Mr. Scalora: That is all. Mr. Hitke.

(Harry J. Hitke was thereupon called as a witness on behalf of the Plaintiff for cross examination under section 2055 of the Code of Civil Procedure of the State of California.)

Testimony of HARRY J. HITKE, witness produced on behalf of the Plaintiff herein, sworn.

Cross-examination

By Anthony J. Scalora, Esq., counsel on behalf of the plaintiff herein:

[fol. 1431] The Court: I think we will take the morning recess.

(Recess.)

Q. Your name, Sir, is Harry Hitke?

A. Harry J. Hitke.

Q. All right. Would you state for the record what your occupation is with the Southern Pacific Company, a corporation, in Sacramento?

A. General Foreman of the Freight Car Shop.

Q. What number shop is that?

A. Car Shop Number 9.

Q. And what exactly are your duties in relation to that?

A. I have the general supervision of all the building of new cars and the repairing of old cars in the freight car shop.

Q. All right. Now, how many tracks do you have to work on for that work?

A. We have ten repair tracks in our main part of the shop, two light repair tracks and some thirteen storage and switching tracks in what we call the cabbage patch.

Q. And do you have tracks over there that are known as new car tracks where you build new cars?

A. They are designated as construction tracks, yes.

Q. How many of those do you have?

A. We have two main tracks.

Q. So that would mean then you have two construction tracks and ten repair tracks?

A. We have several supporting tracks necessary for the building of new cars.

[fol. 1432] Q. All right. Now, what percentage of your personnel in Car Shop 9 is directed towards the construction of these cars?

A. At the present time?

Q. Well, let's take it in June of 1951.

A. In June of 1951 there was about 50 per cent.

Q. Now, Mr. Hitke, isn't it a fact that the Southern Pacific Company, a corporation, has a contract of employment with the Unions that these men are all members of the A. F. of L?

A. To my knowledge, yes. I can't say that for a fact.

Q. Now, isn't it further a fact that in those particular contracts of employment that the men that are covered by the terms of these contracts are just general employees within the particular category of work that they are labeled such as, say, a car man's helper and that they are not assigned to any specific task, but by the terms of that contract with the company they can be used anywhere at any time within that particular field of work?

A. Anywhere in the shop that I so desire to place them, that is right.

Q. And isn't it further a fact that of the some six hundred or more employees that you control and supervise that not one of those particular employees is designated to a

particular type of work at which he is assigned and kept at constantly?

A. Yes. Yes, take our new car line in particular, when we assign the men on that track they stay on that job.

Q. For how long?

A. For the duration of the job.

[fol. 1433] Q. All right. Now, that is for the duration of the job. That is a particular order that you may have at that time for construction of new cars, isn't that correct?

A. That is correct.

Q. You get a lot of different orders for construction of new cars, do you not?

A. That is correct.

Q. You don't construct new cars always for the same purchaser or always for the same railroad, isn't that correct?

A. We build the new cars for the Southern Pacific Equipment Company and them alone.

Q. Just them alone?

A. That is right.

Q. Is that company known as the T. & N. O. Railroad Company?

A. No, it isn't.

Q. Have you heard of the T. & N. O.?

A. Yes.

Q. Now, isn't it a fact that in June of 1951 when Mr. Eelk, a carman's helper was injured, that you had an order for 1500 new gondola cars for the T. & N. O. Railroad?

A. At that time we had an order for 1000 gondola cars.

Q. For the T. & N. O. Railroad?

A. We were stenciling them T. & N. O., yes.

Q. Now, those 1000 cars, do you recall how those cars were being shipped and hauled from California to the point of destination?

A. After we completed the car we had specific instructions to bill them under Southern Pacific Company billing to various locations.

[fol. 1434] Q. And where would these various locations be?

A. Well, Oregon, Nevada or Arizona.

Q. All out of the State of California?

A. That is correct.

Q. Do you know who the purchasers were?

A. We built the cars for the Southern Pacific Equipment Company, that is all I know.

Q. All right. And they were the purchasers as far as you know?

A. That is correct.

Q. Now, did the transportation yard here in Sacramento use its equipment and men to haul these gondola cars to those various points of destination?

A. To my knowledge, yes.

Q. That means then that Southern Pacific Company, a corporation, here in Sacramento manufactured gondola cars, then through its tracks, lines, equipment and men transported those particular gondola cars to various places in Oregon, Nevada and Arizona, referring specifically to the 1000 cars that were being ordered by the T. & N. O. when Charles Eelk——

Mr. Wulff: (Interposing) There is no evidence here that these cars were being ordered by T. & N. O. That is putting words in the witness' mouth.

The Court: That assumes something not in evidence. Sustained.

Mr. Scalora: Q. Could you tell us who ordered those cars?

A. The Southern Pacific Equipment Company and that's all I know.

[fol. 1435] Q. Where do you get your orders from, Mr. Hitke?

A. Through the Superintendent's office.

Q. Here in Sacramento?

A. Here in Sacramento, yes.

Q. What is the name of that superintendent?

A. Mr. Vance.

Q. Do you know where Mr. Vance gets his orders?

A. It comes on down through from the General Office through Mr. F. E. Russell, the Superintendent of Motor Power, then to Mr. Vance and then to the Freight Car Shop.

Q. Now, on the 1000 cars which you had an order for in

1951 did you ever notice if they ever had a mortgage plate or a trust receipt document attached to those cars?

A. Yes, sir.

Q. Now, would you tell us what you know as to what the contents was that appeared on that trust receipt or mortgage plate, what was the wording that appeared thereon?

A. Well, I probably won't say I have the wording in my minutes, but it is the Pennsylvania Banking Company. I don't have the correct wording, what it says on it.

Mr. Dunne: Do you want the exact name?

Mr. Scalora: May we have it?

Mr. Dunne: The Pennsylvania Company for banking and trusts.

Q. Do you know if the trust receipts that you read which were placed on these cars named the Pennsylvania Company for banking and trusts as the title holder?

A. All that I know in respect to that is that I get my [fol. 1436] orders through the office to stencil that ownership plate on the car and that is as far as I know. I don't know anything else about the handling of the financial end of it.

Q. Do you know if that trust receipt listed the Pennsylvania Company for banking and trusts as the purchaser of that particular car?

A. No, I don't.

Mr. Dunne: Do you want the exact wording?

Mr. Scalora: May we have that read into the record?

Mr. Dunne: I am going to read it from the Equipment Trust document.

Mr. Scalora: Is this the actual trust receipt that appeared on the gondola car?

Mr. Dunne: I am going to read what the document provided should be put on there and explain that the document was complied with. It reads this way:

> "Southern Pacific Company Equipment Trust Series EE, the Pennsylvania Company for Banking and Trusts, Trustee, Owner and Lessor."

Mr. Scalora: And who would be the beneficiary? Do you know who the beneficiary is?

A. I don't know.

Mr. Dunne: Do you want that information?

Mr. Scalora: Yes, may we have that information?

Mr. Dunne: The lessee, the immediate lessee, is Southern Pacific Company which in turn on these particular cars [fol. 1437] leased to T. & N. O., sublessee.

Mr. Scalora: Sublessee was T. & N. O.?

Mr. Dunne: Texas and New Orleans.

Mr. Scalora: T. & N. O.

Mr. Dunne: Now, do you want a copy of that document?

Mr. Scalora: Yes, I would like to have that.

Mr. Dunne: Put that in evidence, all right. I hand that to the clerk. It contains the two documents, if your Honor please, the equipment trust provisions.

Mr. Scalora: May I see it, please?

Mr. Dunne: Certainly.

The Court: That is just a portion of that document that he has in his hand there.

Mr. Dunne: This is the full document. It contains two documents and contains the provisions for the equipment trust itself as the second document and then the first document is the lease by the trustee to Southern Pacific Company.

Mr. Wulff: Lease and purchase agreement.

Mr. Dunne: That is what it amounts to. It is the form of agreement that your Honor is familiar with. They didn't know whether they were going to sustain the conditional sales and Pennsylvania worked out the document of lease purchase agreements and that is what this is. These are the ones that are uniformly used for the financing of railroad equipment.

The Court: Then are you offering the entire document in evidence?

[fol. 1438] Mr. Dunne: Yes, we might as well have the whole thing because it will explain parts of this transaction.

The Court: Is that agreeable, Mr. Scalora?

Mr. Scalora: I have no objection, your Honor.

The Court: All right. That will be Plaintiff's Exhibit 1, I guess.

(The Agreements last above referred to were by the clerk then marked Plaintiff's Exhibit 1 in evidence.)

Mr. Salora: Q. Now, Mr. Hitke, Charles Eelk in June of 1951 was a carman's helper for Car Shop 9, isn't that correct?

A. That is correct.

Q. All right. Now, on the particular date of, I think, June 22nd when he was injured, isn't it a fact that the gondola car number 506 that he was working on was then and there in what is known as the last stage, the final stage, before its preparation preparatory to being made ready for shipment out of the State of California?

A. No, it had a lot of steps to go through before it would be completed.

The Court: Have you laid the foundation as to those steps? The Court does not know what they are.

Mr. Wulff: We have a diagram of that if you wish it.

Mr. Scalora: Q. First of all was the car resting on tracks?

A. It was on tracks, yes, sir.

Q. The wheels were attached?

A. That is correct.

Q. The axles were on the wheels?

A. That is right.

[fol. 1439] Q. Was the platform on?

A. The body, the steel, was on, but no wood.

Q. All right, the steel was on. Was the steel all intact, completed insofar as whatever was necessary to make it an intact piece of equipment?

A. All but a portion of the riveting would have to be done at the next location.

Q. And the portion of the riveting that you are referring to, what work did that involve, how gigantic of an operation was that?

A. The safety appliances were the most that would have to be riveted in the next position.

Q. How long does that normally take?

A. Our line moved every twenty-five minutes and the work was lined up to be done in twenty-five minutes.

Q. So, if we have this car at the time Mr. Eelk was working on it, it remains in a position where there was a twenty-five minute piece of work for the riveting and the wood part to go on, is that correct?

A. There are several other operations. There is, oh, in the neighborhood of about twenty more spots for that car to go through before it would be completed.

Q. Take the twenty more spots you are referring to all totaled, how much time would it consume to go through those twenty more spots and make it ready for transportation?

A. Before that car would be ready for transportation it [fol. 1440] would be several days.

Q. Several days?

A. In our line there were about 100 cars, in the line before they went out of the shop.

Q. Mr. Hitke, didn't you hear Mr. Vance testify that you were building eighteen new cars a day?

A. We were building eighteen new cars a day.

Q. How could you build eighteen new cars in a day if on this particular car it would take several days just to complete the last stages of it?

A. We had two days at the paint track.

Q. When you say that you build eighteen new cars a day, does that actually mean that a car can be started, you start work on the morning shift and when that shift is through that day that that group of three hundred men have completed eighteen cars?

A. That is correct.

Q. Well, what was there about this particular car, number 506, that demanded several days to complete it?

A. You have your regular lineup, your assembly line is set up to where it takes a number of spots to complete the car. Now, I have to look at my chart to see the exact amount of spots we had in this particular case, but they run up to in the neighborhood of eighty-five to ninety spots in the construction line in order to complete that car.

Q. Wasn't that true of all of those other cars that you completed in one day?

[fol. 1441] A. You don't complete one car in a day. In other words, it takes your various stages of operation to complete.

The Court: As I understand, that eighteen cars means that eighteen finished cars come off your assembly line as an average in a day?

A. That is correct.

The Court: That does not mean all those cars are built in a day?

Mr. Scalora: Q. Actually you don't build a car in one day.

A. No, our first operation is the assembling of the trucks.

The Court: How long does it take on an average to build a car from start to finish?

A. Well, there is in the neighborhood of eighty spots.

The Court: I mean just an approximation, I know you cannot tell that probably exactly.

A. It takes in the neighborhood of about four, around four days to go through the various operations in the line and then we have our paint track off to the side.

Mr. Dunne: If you had one hundred on the line and completed eighteen a day, that would run about five days.

The Court: Yes, that is correct. Is that about the average?

A. About the average on that program, yes.

Mr. Scalora: All right. Do you know what day you were on on Number 506 at the time Charles Eelk was injured, when you reached that stage of the proceeding where it [fol. 1442] was ready for the riveting of safety appliances, what day in the operation does that usually get to?

A. That car would have been laid down on the line the day before, the morning of the day before.

Q. Then in the space of just one day you are able to take and build the body, put the wheels on, put the axle on and make everything intact except just for its safety appliances?

A. To clarify a point, it is just assembling. In other

words, we assemble that car. We don't build all the various fabricated parts on that line. We just assemble.

Q. If you don't build it and you just assemble it, where do you get your units from?

A. The under frames, for instance, come from the Consolidated Western Steel Company in Los Angeles.

Q. And where do they get it?

A. They build them.

Q. Right in Los Angeles?

A. In Los Angeles.

Q. All right. Do you build all of your own axles?

A. The axles are furnished from the various steel companies, I don't know which ones.

Q. Some of them out of state?

A. Yes.

Q. All right. What about the wheels?

A. The wheels are manufactured in our own foundry in Sacramento.

Q. All right. Are they manufactured from new molten steel or iron or do you take old wheels from old freight [fol. 1443] cars and recast them?

A. That is out of my line.

Q. You have no knowledge about that?

A. I don't have any knowledge of the actual foundry function, no.

The Court: Maybe you can stipulate to that.

Mr. Wulff: Well, if your Honor please, I think we have divergent views on that.

The Court: All right.

Mr. Scalora: Q. Well then the make-up on this new constructed car may in effect be nothing more than parts of old equipment, from Southern Pacific, that has been brought into the foundry and recast?

A. That I would not know.

Q. You have no information at all on that?

A. No.

Q. Now, in addition thereto you also bring in parts, even new parts, that are brought in on occasions from other corporations engaged, for example, in steel work outside of the State of California?

A. That is correct, in some instances, yes.

Q. Yes. All right. Do you know if in particular car number 506, the car which Mr. Eelk was injured on, this new gondola car, do you know where the materials and supplies came from that made up that car?

A. We would have them in our records. Several of the [fol. 1444] items I remember, but I wouldn't know all the incidental parts.

Q. In particular have you ever heard of the Pacific Fruit Express Company?

A. Yes, sir.

Q. Southern Pacific of Mexico?

A. I have heard of the Pacific Fruit Express but not of Mexico.

Q. Have you ever heard of Northwestern Pacific Company?

A. Yes, sir.

Q. Do you know of your own knowledge if 84 per cent of the wheels used on freight trains made by the Southern Pacific Company, a corporation, here in Sacramento, if those wheels are not on occasion sold to these various corporations out of state?

Mr. Dunne: That is objected to as incompetent, irrelevant and immaterial. We are not concerned with the operation of the foundry in this case.

Mr. Scalora: Q. Well, do you know?

The Court: Sustained.

Mr. Scalora: I think that is proper.

Q. Do you know if the wheels which are made in your own foundry here in Sacramento, do you know if the particular wheels that you used on number 506 came out of the Sacramento foundry?

A. Yes, they all came out of the Sacramento foundry.

Q. They all came out of the Sacramento foundry?

A. All the wheels for our new car program come out of [fol. 1445] our Sacramento foundry.

Q. Now, Mr. Hitke, of the 1000 cars that were being constructed for the T. & N. O. in and around June of 1951, do you know of your own knowledge if all of the parts and all of the equipment that went into the makeup of those new cars included worn out parts recast from any freight cars

that belonged to Southern Pacific, a corporation, in Sacramento?

Mr. Wulff: That is too far removed, too indirect, too remote, too speculative.

Mr. Scalora. That is a very material point in question, your Honor.

Mr. Wulff: He is not making parts. He is in the actual assembling or construction.

Mr. Scalora: I am only asking, your Honor, if those assembled parts came from other pieces of Southern Pacific Equipment.

The Court: Well, there is already testimony here that the wheels are made in the wheel foundry here and that those wheels are made from parts of worn-out wheels that come in and are melted and recast. Now, what additional information do you want?

Mr. Scalora: I was interested in particularly, your Honor, such things like platforms, steel platforms and steel sides.

A. That was all new.

Mr. Scalora: Q. All brand new?

A. All brand new equipment, yes, sir.

[fol. 1446] Q. Now, do you have any idea where the steel platforms and the steel sidings came from?

A. The underframes is what you call platforms?

Q. Yes, sir.

A. Come from the Consolidated Western in Los Angeles.

Q. And what about the steel sidings?

A. The steel construction for the sides come from the same company located in Berkeley, California.

Q. Now, what about the roof?

A. No roof on these cars.

Q. These are cars without roofs, is that correct?

A. That is right.

Q. You stated that wood would go into these things?

A. That is right.

Q. Would that be new lumber?

A. All new lumber.

Q. Where did you buy your new lumber?

A. The new lumber come from Oregon.

Q. How, what brought it from Oregon to California?

Mr. Wulff: That is immaterial, too remote.

Mr. Scalora: Q. For example, do you know if Southern Pacific Company here in Sacramento, a corporation,——

Mr. Wulff: (Interposing) I am going to object.

The Court: He has an objection.

Mr. Wulff: I withdraw that.

Mr. Dunne: We don't care.

[fol. 1447] The Court: All right.

Mr. Scalora: Q. Do you know how they transported it from Oregon to Sacramento?

A. It was delivered to our Sacramento Shops in freight cars, that is all I know.

Q. Southern Pacific equipment?

A. That is right.

Q. All right. Now, Mr. Hitke, do you know if Mr. Eelk as a carman's helper in and near the time of his injury had also been engaged in work on the repair and renovating of used freight cars in Car Shop 9?

A. Well, would you want me to give you his record as I know it? I looked up his record.

Q. Yes, would you.

A. Mr. Eelk was hired on November 7, 1950. He worked until November 30th on old work. On December 1st he was reassigned a new job on the new car program. He stayed on this new job until we ran out of material January 8, 1951 and we did not receive material to continue the new program until February 13th.

Q. What did he do during that time?

A. During that time he worked on old work.

Q. In other words, he could be shifted back and forth?

A. Just when the program closed down, we move the gang as a unit on to old work to keep from laying them off.

Q. Let's put it this way, do you understand as an actual fact that while new car construction was going on that at no [fol. 1448] time was Charles Eelk ever, while new car construction was going on, ever shifted even one hour in a day on old car repair work?

A. To my knowledge, no.

Q. Well now, when you say to your knowledge, are you actually in a position to observe whether that could happen

or not; do you follow this man's work day by day that close?

A. No, we have some six hundred employees in Car Shop 9 and it would be impossible to follow every man daily. We have our supervisors that take care of that.

Q. For example, Mr. Hitke, isn't it possible that this man on occasions, a foreman on a particular job needing a car man's helper would ask your permission to use this particular man and take him from new construction over to freight car repair?

A. That could not be because the men on new cars work as a unit. If one man was taken out of that line it would stop the whole production of that particular unit.

Q. Then it is your testimony that that never happens?

A. That is right.

Q. For example, Mr. Moore, are you acquainted with Mr. Moore?

A. Foreman?

Q. Yes.

A. James Moore, yes.

Q. Then Mr. Moore, the foreman, in particular has never requested permission from you or from any of your assistants to remove or take men that are used on a particular project such as new construction and an emergency order [fol. 1449] may come in on an old freight car that has to be repaired, and transfer him over and make the men work on the old freight car?

A. No, sir. Our new car line is the primary job. That is given preference over everything else.

Q. In spite of the fact that that work amounts to no more than 50 per cent and in most cases only 30 per cent of the actual work engaged in by Car Shop 9?

A. It runs 50 per cent.

Q. In June of 1951 it was 50 per cent, but on occasion it goes below?

A. And on occasion higher.

Q. And that work is only just equally important with repair work?

A. Not as far as I am concerned. We have the job of constructing the new cars and we set up a program of 18 cars a day in this instance and we have to maintain that 18 cars a day.

The Court: May I interrupt here a moment. You got up as far as February 13, 1951, with respect to Mr. Eelk.

Mr. Scalora: Oh, yes, that is correct.

The Court: What happened after February 13th?

A. We started another program of a different type of car.

The Court: New work?

A. New work, yes.

The Court: Then what happened?

A. He went back on to that new car program.

[fol. 1450] The Court: On February 13th?

A. February 13th.

The Court: Did he stay on it then continuously until the time of this accident?

A. He stayed on it continuously.

The Court: Up to the time including the day of the accident?

A. That is correct.

Mr. Scalora: Q. When you say on February 13th he went on to a new program, new car work, just exactly what did he go to work on?

A. A different class of car which was a box car.

Q. A box car?

A. A box car, that is right.

Q. Now, this box car that you call new work, was that a box car that was made up with completely new materials?

A. That is correct.

Q. You mean they didn't even use any old wheels or any of the old platforms or under parts?

A. We got our wheels from the Sacramento foundry the same as we did for the gondolas, and all the rest of the parts were new.

Q. For example, did any steel go into the construction of those box cars other than just wheels and axles?

A. All new, all new material.

Q. What new material did you actually put into those box cars?

A. New underframes, the sides, the steel ends, steel roof, all of the safety appliances, all new.

Q. And you used the same technique and procedure in

building the freight car that you used on the gondola car?
[fol. 1451] A. That is correct.

Q. Where were the freight cars destined for?

A. For the Southern Pacific Equipment Company.

Q. Just the same as the gondola car?

A. That is right.

Q. Did they also have trust receipts on them?

A. Yes.

Q. Now, did you ever observe whether freight cars that no longer were in condition to be used any more and too far gone for repair were ever dismantled and parts saved from them, recast, remolded for use in these freight cars that you went to work on, on February 13th?

A. No. We dismantle cars——

Q. (Interposing) What did you do with those parts?

The Court: He had not finished his answer yet. "We dismantle cars," but what?

A. But those parts are scrapped.

Mr. Scalora: Yes.

A. With the exception, there is a few parts that the Store Department holds for repairs to old equipment.

Mr. Scalora: Q. Now, Mr. Hitke, when you dismantle a freight car what do you do with the parts that you save?

A. When we dismantle a freight car that is condemned, they turn it over and burn it, it is all burned complete and then the Store Department sends their scrap cutters and they cut all those parts up. That is sold. With the exception [fol. 1452] of a few parts that are saved for repairs to the old equipment, the rest is burned or sold. Now, the wheels, I don't know how they handle them. They go through the foundry. I have never followed that through.

Q. Do you know if any of those wheels appeared in those freight cars that Mr. Eelk worked on?

A. There are no old wheels, they are all new cast wheels out of the foundry. They use a certain percentage of old cast to make the new wheel, that I do know.

Q. Now, these pieces of scrap that they cut up, what do they do with them?

A. Sell it.

Q. They don't use it themselves in their foundry?

A. They sell it to the outside foundries.

Q. They sell it to the outside foundries?

A. That is out of my hands again. All I know is that they sell it.

Q. You don't know if it is put into the foundry and brought back into the yard again, on jobs again, as recast into a different shape or form, a new wheel or a new axle?

A. That I couldn't say.

Q. Now, do you know in particular what happened to the one thousand cars that were under an order for this Texas corporation?

Mr. Wulff: If your Honor please, I object to that. That is not in evidence. There is no order from the Texas Com-[fol. 1453] pany. There is no such evidence.

Mr. Scalora: I thought there was testimony in here, your Honor, that they had received an order for one thousand cars and that it was for the T. and N. O.

The Court: One of the witnesses said they were stenciled T. & N. O., but the trust receipts show they were to the Pennsylvania Company for Banking and Trusts as trustee owner and lessor and then subleased back again to the T. & N. O.

Mr. Scalora: My understanding was it was a Texas corporation.

The Court: Why don't you frame the question so that the witness will know what you mean.

Mr. Scalora: It was a Texas corporation.

The Court: That objection will be sustained. You have a right to inquire about these cars, but you have characterized them incorrectly. They are the cars which we will say eventually the Texas and New Orleans Company became the lessee of.

Mr. Scalora: Yes, that is under a lease purchase agreement as I understand it.

Mr. Wulff: No, it is not.

The Court: I don't know.

Mr. Wulff: Sublease.

The Court: It is a sublease.

Mr. Scalora: As I understand it the lessor and trustor [fol. 1454] are the Pennsylvania Company for Banking

and Trusts. The lessee, as I understand it, is the Southern Pacific Company, a corporation, who subleases to the T. & N. O.

The Court: That is right.

Mr. Scalora: As I understand it, your Honor.

The Court: You referred in your question, evidently you have referred to these cars, you said the cars that were sold to Texas and New Orleans, and, of course, that is not correct. That would assume a transfer of title, and Texas and New Orleans Company is only a sub-lease.

Mr. Scalora: Q. Can you tell me if your records show what the disposition was of the one thousand cars that were built in Car Shop 9 which according to the trust receipt indicated that point of destination was the T. & N. O. with delivery in Oregon, Nevada and Arizona after your shop had completed them, manufactured and constructed these cars.

A. We don't have any such instructions.

Mr. Dunne: Objected to because the trust receipt does not designate that. Counsel, may I make this suggestion to you? You are having trouble designating this particular order of one thousand gondola cars and distinguishing them from some other cars. I think you will simplify it if you will ask the witness whether or not those thousand cars as far as he was concerned were on what was known as a Southern Pacific Equipment Company T order, and he will give you the order number and then you can refer to those cars by that order number.

[fol. 1455] The Court: Well, all we want here is a designation for this particular group of some thousand cars which were manufactured around June, 1951. You are familiar with that group?

A. That is right, your Honor.

The Court: And the previous witness has said that they were stenciled T. & N. O.

A. That is correct.

The Court: You are familiar with that. You can just refer to them as those cars from now on.

Mr. Scalora: Q. Referring to that particular thousand cars, you understand the cars we just designated?

A. Yes, sir.

The Court: Counsel has referred to it by number. Do you know the number?

A. Order 3061.

The Court: 3061 was the order number for this particular thousand cars.

A. P order.

Mr. Scalora: Q. Does that stand for Purchase Order?

A. That comes out of the General Office and is handled through that office, and I don't know.

Q. You don't know what the letter "P" stands for?

A. No, I don't. It comes out of the General Office.

Mr. Scalora: Can you help us, Counsel?

Mr. Dunne: I think that is what it stands for, Purchase [fol. 1456] Order. I think that is where they got the P.

The Court: Can you give us the terms of that purchase order or P Order with reference to those cars? I presume the order will speak for itself.

Mr. Dunne: Well,——

A. All I have is the number. In other words, all of my material requisitions, everything refers to that P Order.

The Court: What is the number of it?

A. P-3061.

The Court: 3061?

A. Yes.

Mr. Scalora: Q. Do you have a copy of that order?

A. No, all they give me is the number. I don't have any orders in respect to it.

The Court: Is that available here?

Mr. Dunne: Actually, if your Honor please, there is no written order. It is not on a printed form. It is used for accounting purposes only. Everything that is used can be referred to that number. It is the Southern Pacific Equipment Company's order P-3061.

The Court: We will take the noon recess at this time, Gentlemen, until 2:00 o'clock.

(Thereupon a recess was taken until 2:00 p. m. of the same day, June 12, 1952.)

[fol. 1457] Afternoon Session:

(HARRY J. HITKE resumed the stand for further cross examination.)

Mr. Scalora: Q. Now, Mr. Hitke, on the gondola cars that were being constructed in June of 1951, those cars were numbered, were they not, Sir?

A. That is right.

Q. Now, like I notice—you check me if I am wrong—that the number of the car in particular on which Mr. Eelk, the employee here, was working at the time he was injured was car number 506 or 507?

A. That was just a shop designating number.

Q. All right. Now, does that mean that number 507 of the 1000 cars being ordered, is that the way it would work out?

A. That is correct.

Q. Then you would use the number 1 to 1000 on the shop order?

A. No, the 1 to 1000 is just our shop number stamped on the end of the car so that we can keep track of them going through the shops.

Q. Now, who placed the trust receipt on each car?

A. Our painters.

Q. Your who, sir?

A. Painters.

Q. And where did they receive the trust receipts from, to your knowledge?

A. They receive instructions from me. In other words, I get the information from the office as to what trust series is to be stenciled on a particular series of cars.

[fol. 1458] Q. Now, on each one of the 1000 cars was the Pennsylvania Company for Banking and Trusts stenciled on there as trustee owner and lessor of each car?

A. Not on all of them.

Q. On how many to your knowledge?

A. There were a few of them that were freight cars and I don't have the exact numbers.

Mr. Dunne: If you want that, I can give it to you.

Mr. Scalora: Yes, sir.

Mr. Dunne: The last 92 of this 1000 did not go under any equipment trust.

Mr. Scalora: The last 92.

Q. So that means that when you got around 818, then you stopped using that stencil showing them, is that correct?

A. That is correct.

Q. Up to that point, though, Pennsylvania Company for Banking and Trusts did appear thereon stenciled as the owner of the new gondola cars that were being constructed under this particular order?

A. That is right.

Q. Now, to your recollection, Mr. Hitke, what had been the last train movement out of Sacramento carrying the newly constructed gondola cars just prior to the date that Mr. Eelk had been injured?

A. Well, the cars left Sacramento every day.

[fol. 1459] And how many engines were dedicated to the task of hauling these new gondola cars?

A. I do not know.

Q. Now, do you know if they were hauled from a particular track?

A. We have a switch engine that is assigned to Car Shop. 9 the first thing in the morning, about 9:00 o'clock. This switch engine takes out all new cars and puts them on the scale for weighing. From there on the Division forces take over.

Q. Then I imagine or take it when the switch engine comes over to the track where the new gondola cars are set out, it couples up with those cars and places them on another track where a train is being made up?

A. Up on the scale track for weighing.

Q. Now, each day as the new gondola cars are hauled out of Sacramento, do you just take the new gondola cars and haul them around or do you couple them up onto a train with other freight?

A. There is other cars along with them, I don't know how many, but there is other cars.

Q. I see. Now, did you not testify that to your knowledge some of the gondola cars under this particular order were

being hauled to the State of Oregon, State of Nevada and to the State of Arizona?

A. I said that is where we had instructions as to where the new cars were going to be shipped. However, on this 1000 gondola cars, a portion of them went to Oregon and a [fol. 1460] portion to Nevada. There wasn't any to Arizona on this 1000 car program.

Q. Just Oregon and Nevada?

A. That is correct.

Q. Now, at the time that the gondola car is completed and hauled out of the Sacramento yards, do you know if there is a definite number at that time that appears on the gondola car other than your number that you have, Car Shop Number 506 or 507; do they put a serial number on that?

A. That 1000 cars were numbered in Series 47,000 to 47,999.

Q. Series 47,000?

A. That is right.

Q. Now, do those serial numbers indicate or mean anything to you?

A. Just the car number is all.

Q. And how do they stack up or relate to the series or numbers used on cars that the Southern Pacific Corporation itself owns?

A. All groups of cars are numbered in various series. None of them would tie right in directly with that series of numbers.

Q. Then this would be a separate series number, for example, from, say, 1000 freight cars that Southern Pacific itself was using on its own lines?

A. They wouldn't be in that series of numbers, no.

Q. Now, to your knowledge do you know if any one of the 1000 gondola cars constructed in Car Shop 9 were ever brought back into Car Shop 9 for repairs?

[fol. 1461] A. Yes, there has been a few occasions where cars after they have been out for a while come back in for other minor running repairs.

Q. And on a repair of that particular car, do you still use the same crews?

A. No.

Q. You use different crews?

A. Our repair crews.

Q. I see. And where do you get your orders from to repair a particular car like that?

A. The cars in bad order in the Division, all cars that are bad order have to be shot to the repair track for repairs before they can be continued in service. So, we have cars shopped daily for light and running repairs.

Q. Now, is it true that in the repair in Car Shop 9 often cars other than those belonging to Southern Pacific Company, cars being borrowed, for example, from other train corporations in other states, which may tie up on a load that comes through Sacramento can be repaired in the Sacramento Shops even though that particular car does not belong to Southern Pacific Corporation?

A. That is correct.

Q. So, the mere fact that it is repaired in the Southern Pacific Corporation general shop here in Sacramento, Car Shop 9, does not mean that the car itself actually belongs to the Southern Pacific Corporation?

[fol. 1462] A. No.

Q. I notice you have some notes there. Could you tell us what those are, what those records are?

A. Just before we recessed the question of billing came up and I took the liberty to bring up some of the billing receipts that we have, our copies of them, where we bill the cars.

Q. That is where you would bill the cars?

A. Where the cars are billed and a copy of the bill of lading, commercial bill of lading.

Q. What did you find from having checked that, is there any information or light you can throw on this from those records?

A. This just tells the actual billing of the car, who to, and so forth.

Q. I see. Now, for example, do those records pertain to these 1000 gondola cars that we are speaking about?

A. These don't directly pertain to them. My girl that brought these over picked up the wrong group. This was another group of all steel gondola cars constructed after this group that we are talking about, but it is the same billing.

Q. Same billing. Is that where you got your information that it was Oregon and Nevada and not Arizona?

A. Now, to begin with I stated our instructions were to bill them to Oregon, Nevada and Arizona. However, to my knowledge we have not billed any cars to Arizona as yet. They just went to Oregon and Nevada.

[fol. 1463] Mr. Scalora: Well, I think that is all the questions I have of this witness, your Honor.

(The witness was then taken by Mr. Dunne for redirect examination.)

Redirect examination

By Arthur B. Dunne, Esq., of counsel on behalf of the defendant herein:

Q. Mr. Hitke, because the question was asked, to fill this out a little bit, will you give us the name of the consignee on those bills of lading?

Mr. Scalora: Well, would it be material, your Honor? I thought his testimony was that these bills of lading do not apply to the particular 1000 gondola cars that were involved here.

The Court: That is right, but he did say they were identical and I assume he means the consignees would be the same.

A. That is correct.

The Court: Is that correct?

A. That is correct.

The Court: It may go in if that is so.

Mr. Dunne: Q. Just read off the way the consignee's name reads.

A. Consigned to Mr. G. M. Gutterman, Agent and Trustee, the Pennsylvania Company for Banking and Trusts, under Southern Pacific Company Equipment Trust Series, in this case, it is H.H.

[fol. 1464] Q. In the case of the gons it was E.E.?

The Court: E.E.?

A. That is right.

Q. Will you read us the name of the consignor or shipper first. Let me ask this question, on these bills of lading the form of the consignments, shipper and consignor are the same on these cars as D-3061—Is that E or P, P-3061—who was the shipper?

A. S. P. Equipment Company in care of Mr. F. E. Malloy, Superintendent of Motive Power, S. P. Company.

Q. Now, Mr. Hitke, so we can understand the setup of this line—as I understand this could be direct examination—you have tracks that are assigned to the construction of these new cars in Car Shop Number 9, is that correct?

A. That is correct.

Q. And they serve as an assembly line?

A. That is correct.

Q. Now, you said there were stations on that line. What do you mean by that?

A. Well, various spots for the different kinds of work to be performed along the line.

Q. For instance would the first spot be where the wheels are put down?

A. The number one spot would be the truck assembly.

Q. Then when the trucks are down they go to, I take it, the number two spot?

[fol. 1465] A. That is correct, where the underframe is put in place on the trucks.

Q. And it is moved to number three spot?

A. Where the air brakes are applied.

Q. And then on eventually to the point where the frame being there, you put on the sides and ends, is that correct?

A. That is correct.

Q. Now, how are the sides and ends—and I am going to confine my questions to this series of 1000 gons under P-3061—when the sides and ends are attached, how are they applied?

A. We have an overhead craneway with an electric hoist. The sides come in on cars under this craneway where they are picked up by means of the electric hoist and swung over into place and placed on the underframe.

Q. And then what holds them on the underframe?

A. We bolt them temporarily, they are temporarily bolted and they are also spot welded to the underframe.

Q. And then that gets into position. What is the next thing?

A. The next position, it goes up and the steel ends are applied by means of an electric hoist.

Q. And are they given a temporary attachment in the same way?

A. That is correct.

Q. Then what is the next step?

A. Then they go down to the next spot for what we call the corner caps that hold the sides and ends together at the [fol. 1466] top are placed on. All the reaming is performed in that position.

Q. Now, I think I understand and his Honor probably does, but for the record what do you mean by reaming?

A. Reaming the holes so that the proper sized rivets can be placed in.

Q. That is when you have two pieces of steel coming together and a rivet is to go through both of them and you not only want the holes to be right size but you want the holes in each piece to be right over each other?

A. That is right, properly aligned.

Q. You call that reaming?

A. Reaming, that is correct.

Q. Then I take it the next major step is riveting them together?

A. The next spot would be the riveting of the ends.

Q. In this particular case we are concerned about the riveting. Is there a standard number of men in the riveting crew?

A. Four.

Q. And what functions do those four men perform?

A. Well, there is a rivet heater and a rivet catcher or sticker, a rivet driver and a rivet bucker.

Q. The heater, of course, that is plain, he is the man that heats the rivets red hot so they can be riveted?

A. That is right.

Q. And the second man catches them when they are tossed in his bucket and puts them in a hole?

[fol. 1467] A. That is correct.

Q. That is the sticker?

A. That is correct.

Q. The bucker is the man who holds them in place?

A. That is correct.

Q. And the riveter is the man who operates the rivet guns?

A. That is right.

Q. What are those rivet guns, about three feet long, two and a half?

A. They are around about twenty-two inches long, somewhere in that neighborhood.

Q. Now, in that type of riveting, is that a hand gun?

A. That is a hand operated gun.

Q. When you use a hand gun in riveting, in doing this particular type of work you are describing, there are always four men in the crew?

A. That is right.

Q. And if one man should be injured during the course of the day or otherwise be absent, what happens to that crew?

A. We have to reach over into our repair program and pick out a man and bring him over and assign him to that job to fill out that crew.

Q. But taking a man off a riveting crew would put that crew out of commission until he was replaced?

A. That is correct.

Q. And if a rivet crew in this assembly line as you have described, a rivet crew going this particular type of riveting, the ends and sides was not operating, what effect would [fol. 1468] that have on the whole line?

A. It would stop the whole line. It only takes one spot to stop the whole line.

Q. Now, you talked about wheels, frames, trucks, underframes, sides and other parts of these cars. Do you keep track of the material that goes into each car?

A. Not individually. We have our material list of how much material it takes to go on to make up a car.

Q. Where do you get that material from?

A. From the Southern Pacific Equipment Company.

Q. Do you requisition it out of their stock?

A. Requisition it out of their stock.

Q. The Southern Pacific Equipment Company keeps its own stock of the necessary materials then?

A. It has its own stock separate from the Southern Pacific stock, yes, sir.

Q. Does that include everything that goes into the car?

A. Everything that goes into the car, yes.

Q. And would it be large parts like the underframes and wheels?

A. The underframes, wheels, truck parts, sides, lumber, bolts and nuts, everything that makes up that car is handled by the Southern Pacific Equipment Company.

Q. Now, I don't want to ask you a question which is beyond your province, if you don't know; if you do know, I would like you to answer this question: Do you know where Southern Pacific Equipment Company get that ma-
[fol. 1469] terial and how it gets it?

A. Well, to my knowledge they requisition the material from various outside specialty steel companies.

Q. Well now, you have told us this morning, for instance, and I want to clear this up, you mentioned, I think it was, sides on this particular program 3061 came from, I think you said, Western Construction Company?

A. Consolidated Western.

Q. Consolidated Western in Los Angeles?

A. The underframes.

Q. The underframes. Now, those underframes, were they ordered by Southern Pacific Company and sent to Southern Pacific Company or was it Southern Pacific Equipment Company that purchased them?

A. They were ordered by the Southern Pacific Equipment Company and shipped to the Southern Pacific Company in care of the assistant general storekeeper at Sacramento.

Q. And who paid for them?

A. The Southern Pacific Equipment Company.

Q. The Southern Pacific Equipment Company was supplying all the materials that went into this car, is that right?

A. That is correct, yes, sir.

Q. Now, you talked about wheels this morning that came from the Southern Pacific Company Foundry here in Sacramento. Did Southern Pacific Equipment Company, the equipment company, buy those from Southern Pacific Company?

[fol. 1470] A. The Southern Pacific Equipment Company purchased them from the Southern Pacific Company.

Q. And paid for them?

A. Paid for them, yes.

Q. Then at the time the material went into these cars, the actual material that went into the cars, at that time none of that then was Southern Pacific Company material?

A. No.

Q. All Equipment Company material?

A. That is correct.

Q. The Shop, however, was supplied by Southern Pacific Company?

A. The labor for building the cars was supplied by the Southern Pacific Company, yes.

Q. And the shop facilities also?

A. The shop facilities also.

Q. And was that billed, the labor cost also billed to Southern Pacific Equipment Company?

A. The labor cost for building the cars was billed direct to the Southern Pacific Equipment Company.

Q. Now, are you yourself familiar with the contract between the Southern Pacific Equipment Company and the Southern Pacific Company?

A. No.

Q. Very well, we will prove that by another witness. On this particular series under P-3061, I want to get some other material from you. If you need your own notes or records for this, Mr. Hitke, you get them, but if you can answer without them, we will go right ahead. Can you tell me the [fol. 1471] day when the first car on this program 3061 was laid down?

A. To be sure I better have my notes.

Q. I think you had better do that then, if you will.

A. If I may. I have my brief case here somewhere. The first gondola car on P-3061 was laid down on the line on May 1, 1951.

Q. Now, did you have for the providing of the labor in the building of those cars, did you have another piece of paper for the job known as a shop order?

A. That is correct.

Q. Now, what was the labor shop order for this P-3061?

A. The shop order that we had for labor on this program was 2807.

Q. 2807?

A. 2807, that is correct.

Q. Now, Mr. Hitke, I may be asking a question beyond your knowledge and if it is, please say so. May I ask you first, do you endeavor to actively keep track of the amount of labor that goes in each separate program on each shop order?

A. Yes.

Q. Do you happen to know why it is important to do that?

A. Well, so that it can be properly reported to the I. C. C., and also we have made an estimate of how much the car is going to cost and I keep it for my own purpose of seeing just how much the car actually costs.

Q. That is to say, the Interstate Commerce Commission have those records for the purpose of fixing rates and otherwise. Do you know accurately the cost of each piece [fol. 1472] of equipment?

A. That is correct.

Q. Now, before this program 3061 on the 1000 gons was started, had you before that been building other new cars on this line in the shop?

A. That is correct.

Q. Was that program completed before the first of May of 1951?

A. Yes.

Q. Then you started on this program for 1000 gons, on May 1, 1951?

A. That is correct.

Q. Now, was that other program on the same type or a different type of car?

A. That was a 50 foot automobile car, known as an auto box.

Q. In the making of those cars did you have the same number of stations along the assembly line that you had for these 1000 gondola cars?

A. No, due to the lengthy car we had less spots on our assembly line.

Q. Well then when you finished that one program and were starting on this new one, P-3061, was it necessary for you to set up your assembly line again?

A. It was necessary to make major changes along the assembly line to take care of the different class of car.

Q. And then when you did start on that line with these 1000 gons, did you then assign your men to the new construction on that program?

A. The men were assigned to the new construction on [fol. 1473] that program, yes.

Q. And that program went right on through?

A. That is correct.

Q. For the sake of completeness of the record can you give us the date or about the date when that program, 3061, was completed?

A. It was completed August 8, 1951.

Q. Now, Mr. Wulff has suggested this to me—I think this was partly taken up this morning and then we didn't complete it, the question went off at a tangent. Mr. Eelk went to work on repair of old cars on the seventh of November of 1950, is that correct?

A. That is correct.

Q. And he worked on that, I think you said, through the 30th of November, 1950?

A. That is correct.

Q. Then he was assigned to new car work?

A. That is correct.

Q. And he worked on a new car program from then up until the 6th or 7th, I think you gave us the date.

A. The 8th, as I remember, of January.

Q. Eighth of January?

A. That is right.

Q. And at that time that program was, the work was terminated, was completed, the material for it on hand had all been used?

A. That is correct; and we had to wait for more material to come in to continue that program.

[fol. 1474] Q. Now, did that program have a job number?

A. Yes.

Q. Regular shop number?

The Court: Which program?

Mr. Dunne: This is the one that this man was on from December 1st until January 8th.

Q. What was that shop number?

A. Shop Order 2802.

Q. Now then, so that you wouldn't have to lay off the men in this interval until the new program started, I understand you took these gangs and assigned them to repair work?

A. To repair work until the new material showed up to continue the program.

Q. What date was that?

A. That was on January 8th.

Q. Yes, that was when that work on the new construction work started? What was that date?

A. February 13th.

Q. Now, what was that new construction program that started on February 13th?

A. That was a continuation of the automobile cars on P-3059.

Q. And at that time did you take these men then away from the repair side and assign them back to new car construction?

A. That is correct, yes, sir.

Q. About how many cars were there in that program?

A. The first program was 1000 and on the program that we went back to on the 13th of February was 500.

[fol. 1475] Q. What is the shop number on that program?

A. 2804.

Q. And is that the program that was terminated just before the program for these 1000 gons started?

A. That is correct.

Q. Now, so his Honor will have some idea of the magnitude of these programs, Mr. Hitke, about what was the cost of each one of these 1000 gons under P-3061?

A. They would run about $4400 apiece.

Q. So that total program then was about a $4,400,000 program approximately?

A. That is correct.

Q. And the preceding program on the automobile cars, about what was the cost per unit of those 1500 automobile cars?

A. Well, 1000 of them run $5900 apiece and 500 with auto loading devices run $7400 apiece.

Q. So that was a program totaling approximately in the neighborhood of $10,000,000?

A. That is correct.

The Court: Five hundred cars at $7500 apiece?

Mr. Dunne: About that, yes, your Honor.

Mr. Scalora: That is $3,750,000.

Mr. Dunne: And the other is about $5,900,000.

The Court: You are putting them both together?

Mr. Dunne: Yes, the 1000 and the 1500.

Mr. Wulff: They total $9,650,000.

Mr. Dunne: Q. That was 1000 without loaders and 500 with loaders?

A. That is correct.

[fol. 1476] Q. That is the thing that makes the difference in the cost of the 1000 per unit as against the 500 per unit?

A. That is right.

The Court: Was this first auto box car program that you spoke about that had been going which was continued again on February 13th, was that also P-3059?

A. 3059, yes, your Honor.

Mr. Dunne: Q. Now, these bills of lading that you spoke about, are those the standard prescribed form of bill of lading prescribed by the Interstate Commerce Commission?

A. That is right.

Q. Just like the bill of lading that any shipper would use?

A. That is right.

Mr. Dunne: I have no further questions unless your Honor has something.

Mr. Scalora: I would like to ask some.

Recross-examination

By Anthony J. Scalora, Esq., counsel on behalf of the Plaintiff herein:

Q. Mr. Hitke, isn't it a fact that according to the regulations of the Railroad Commission and the Interstate Commerce Commission that at no time can a train leave the yard at Sacramento until a full description of the trip, the

nature of the merchandise, destination, all of those pertinent and material factors be entered and you must file an original and copy with those commissions?

[fol. 1477] A. That I don't know. That is out of my line.

Q. To your knowledge when any of these gondola cars were taken out of the yard, you stated each day, do you know if any such trip reports were ever filed with the Railroad Commission or the Interstate Commerce Commission?

A. No, I don't.

Q. Giving full particulars as to point of destination, merchandise to be carried and all relative and pertinent information demanded by both of those commissions?

A. No, I don't. I don't have that information.

Q. Now, if I understand you correctly you stated that all of the materials were supplied to Southern Pacific by this Equipment Company?

A. That is correct.

Q. You also stated that the only thing that Southern Pacific as far as your Car Shop 9 was concerned supplied was merely the shop facilities and the labor?

A. That is correct.

Q. You also stated that the 1000 cars cost $4,400,000, is that correct?

A. That is an approximate figure, yes.

Q. All right. Now, when you included that cost, did you take the value of the materials that were supplied by Pacific Equipment Company and include that as part of the cost?

A. That is right, that is the total cost.

Q. Where did you get the figures to show you the amount that the Pacific Equipment Company had paid for those materials?

A. The general office figures out that cost from the various specialties, they compile it all and we get that figure [fol. 1478] from them.

Q. So that you were furnished with material concerning the actual amount of money expended by Pacific Equipment Company for material being used in the construction of these new cars?

A. Not actual, they give me the price of the various specialties, but as far as the actual cost of the car, I don't have that.

Q. You don't have that?

A. No.

Q. Now, you state that it was under, I think, an order number 2807 in which all labor that had been performed on the construction of these cars was charged to the Equipment Company?

A. That is correct.

Q. Now, do you know if that particular order for labor was paid by the Equipment Company?

A. I personally don't know that.

Q. Do you know how they paid if they ever did pay?

A. Well, that goes through the auditing department in the San Francisco office. They take care of all that.

Q. Do you know whether the Pennsylvania Company for Banking and Trusts ever provided a letter of credit out here on the Pacific Coast upon which Southern Pacific Company, a corporation, could draw for all items to be charged against the Equipment Company?

A. No, I do not have that information.

Q. All right. Do you know if a drawing account was placed in any Pacific Coast bank on which Southern Pacific [fol. 1479] Equipment Company would have the right——

Mr. Wulff: (Interposing) You mean Southern Pacific Company?

Mr. Scalora: No, Pacific Equipment Company.

Mr. Wulff: There is no such thing.

Mr. Scalora: Well, Southern Pacific Equipment Company.

Mr. Wulff: That is right.

Mr. Scalora: Q. If Southern Pacific Equipment Company could issue an order drawing a draft and directing that a draft be issued by that Pacific Coast Bank to the Southern Pacific Company, a corporation, for work and shop facilities being used in the construction of these new gondola cars?

A. No, I don't have that information.

Mr. Dunne: Now, Counsel, I think you are under a misapprehension as to how that was handled. If you want the information I would be glad to supply it.

Mr. Scalora: Your Honor, I would like to point out if I may the position that the Pennsylvania Company for Banking and Trusts takes in this transaction wherein they appear as trustee, owner and lessor on these new gondola cars. Apparently there must be some provision of money being placed up by this banking concern in Pennsylvania.

Mr. Dunne: I can show you the documents as to how that is handled.

The Court: Mr. Dunne said he could give you some information on that.

[fol. 1480] Mr. Wulff: We can give you all the information.

The Court: Well, I presume one of the witnesses who was in the Finance Department would be more able to tell you than this gentleman.

Mr. Dunne: Yes, I think that is true, but I think these documents, if your Honor please, are quite self-explanatory.

Mr. Scalora: Q. When you mentioned about the consignee being Mr. Gutterman, as agent for trustee, do you personally know Mr. Gutterman?

A. Yes, I do.

Q. Who does he work for?

A. For the Southern Pacific Company.

Q. And who would designate him as an agent for the trustee, the Pennsylvania Company for Banking and Trusts, to accept the delivery of these new gondola cars?

A. I don't know how that transaction came about, but he is the agent for the Southern Pacific Equipment Company.

Q. On your bills of lading you indicate who the consignee is, do you not?

A. That is right.

Q. And naturally I assume that the consignee is given proper authority to make up the bills of lading so that the delivery may be made at the point of destination?

A. I don't know who appointed him to that.

Q. On the bill of lading, do you know where the original and copies of the bills of lading are kept and filed?

A. In the San Francisco office.

[fol. 1481] Q. And what is done with a copy of the bill of lading?

A. I wouldn't know other than the copy I keep in my office for my own information.

Q. Now, you state that the consignor is the Southern Pacific Equipment Company, is that correct?

A. That is correct, yes.

Q. All right. Then I take it that Southern Pacific Company, a corporation, is the transporter?

Mr. Wulff: You mean the carrier?

Mr. Scalora: Q. Is the carrier?

A. They would be the carrier, yes.

Q. And according to the bills of lading now, who draws the order on the bill of lading, do you know?

A. The Store Department in Sacramento makes out all of the bills of lading.

Q. And where do they get their instructions from?

A. From my office.

Q. And where does your office get your instructions?

A. From Mr. Vance's office.

Q. And where does he get it?

A. From Mr. Russell.

Q. Of San Francisco?

A. No, Mr. Russell in Sacramento. He in turn gets it from San Francisco.

Q. Does San Francisco get their directly from the Pennsylvania Banking and Trust of Pennsylvania?

A. That I don't know.

[fol. 1482] Q. Now, are all of these transactions entered into by contracts drawn between Southern Pacific Company, a corporation, with Pennsylvania Trust to your knowledge?

A. I don't know that answer.

Q. Now, who designates the——

Mr. Wulff: (Interposing) We have witnesses here who know all those things. All he will just say is he does not know.

A. I don't know.

The Court: This is probably out of this gentleman's line.

Mr. Scalora: That is all. I have no further questions.

Mr. Wulff: That is all.

Mr. Dunne: Now, these three documents are the bills

that Southern Pacific Equipment Company renders to the Pennsylvania Company for Banking and Trusts and then that company pays them. That is how Southern Pacific Equipment Company gets paid.

Mr. Scalora: Off the record.

(Discussion off the record.)

Mr. Scalora: I have no objection that they be all offered as the next exhibits in order for the plaintiff.

The Court: Is that agreeable?

Mr. Dunne: Yes, entirely agreeable.

Mr. Wulff: They should be marked 2-A, B and C.

The Court: 2-A, B and C, yes.

(The documents last above referred to were then by the Clerk marked Plaintiff's Exhibit 2-A, 2-B and 2-C, in evidence.)

[fol. 1483] Mr. Scalora: Mr. Maurer.

(Clarence A. Maurer was then called and sworn as a witness under section 2055 of the Code of Civil Procedure of the State of California.)

Testimony of CLARENCE A. MAURER, adverse witness produced on behalf of the Plaintiff, under section 2055 of the Code of Civil Procedure of the State of California, sworn.

Cross-examination.

By Anthony J. Scalora, Esq., counsel on behalf of Plaintiff herein:

Q. Mr. Maurer, would you state your full name, please?

A. Clarence A. Maurer.

Q. What is your official connection with the Southern Pacific Company, a corporation?

A. I am Chief Clerk in the Corporate Accounts Bureau of the Assistant General Auditor's Office.

Mr. Dunne: Now, Counsel, I do not want to interfere with your line of examination at all, but if it is agreeable to

you I may be able to help you by giving you some documents at the inception of this transaction and it may help you then in examining Mr. Maurer. If you would like me to I can start right in at the beginning.

I have here first Resolution of the Board of Directors of Southern Pacific Company that initiated this whole program. There is a photostatic copy of it. This particular program was a $25,000,000 plus program and it was [fol. 1484] followed then by a $40,000,000 program. I have that other resolution if you would like to have that. This we will put in evidence.

The Court: Exhibit 3.

(The Resolution last above referred to was by the Clerk then marked Plaintiff's Exhibit 3 in evidence.)

Mr. Scalora: That is a resolution, your Honor, in which they recognize the freight car shortage and apparently a determination to change over somewhat the usual work of the corporation for the construction of cars to relieve that shortage.

Mr. Dunne: Now, I can show you the documents if you would like them. Many of these cars ultimately through the Equipment Company were ordered from outside car builders, such as Pullman, Standard Pressed Steel, and so forth, but Southern Pacific Equipment Company undertook to construct some of those itself, and here is the resolution of September 15, 1950 of its Board of Directors covering 1000 gondola cars and 500 automobile cars, covered by that resolution.

Mr. Scalora: I might point out in relation to this particular resolution that it appears that the resolution that was made, which is Plaintiff's Exhibit No. 3 in this case, there were contained in that resolution—that the Southern Pacific Equipment Company would construct a particular number and that this particular resolution is apparently a resolution of that corporation adopting a part of the same resolution that was made by the Southern Pacific Corpora- [fol. 1485] tion.

Mr. Dunne: I think that is a fair statement. The Equipment Company took over part of the program as shown by the first resolution.

Mr. Scalora: They are joining in this program of con-

structing new freight cars to relieve the shortage that exists in the American field.

The Court: That is Exhibit 4?

Mr. Scalora: Exhibit 4, your Honor.

Mr. Wulff: Exhibit 4.

(The Resolution last above referred to was by the clerk then marked Plaintiff's Exhibit No. 4 in evidence.)

Mr. Dunne: Then the next step in it, this is a photostatic copy of the original, is an agreement between Southern Pacific Equipment Company and Southern Pacific Company of February 29, 1950, and this particular agreement covers these 1000 gondola cars which are now indicated by their stenciling T. & N. O. Number 47,000—47,999 inclusive.

The Court: Are these documents very extensive, Mr. Dunne?

Mr. Dunne: They are not too extensive.

The Court: I was going to say if Counsel wants to take time to read them, we might take a recess.

Mr. Scalora: It is merely a memorandum of an agreement of February 29, 1950 in which the Equipment Company, Southern Pacific Equipment Company in order to construct a particular 1000 cars which we are concerned with here, does bind itself by this agreement to do the par- [fol. 1486] ticular things that have been testified to here, namely, they would furnish the materials, they would pay for the use of the labor and shop facilities of Southern Pacific Company, a corporation, and that Southern Pacific Company, a corporation, would manufacture these cars for Southern Pacific Equipment Company.

The Court: It is in line with the testimony so far.

Mr. Scalora: That is right, Sir, and it also carries out the resolution adopted at the general meeting of the Board of Directors wherein they inaugurated the $25,000,000 program.

The Court: That will be Exhibit 5?

Mr. Wulff: Exhibit 5, yes, sir.

(The document last above referred to was by the Clerk then marked Plaintiff's Exhibit No. 5 in evidence.)

Mr. Dunne: Now, a series of documents, your Honor and Counsel, which pick up the cars after they are completed

and show how title was handled to them afterwards. In the first instance Southern Pacific Equipment Company enters into an agreement with the George Smith and H. J. Wiley, dated April 1, 1951, to construct certain cars which includes the first 528 of this program.

The Court: What date was that?

Mr. Dunne: April 1, 1951.

Mr. Scalora: April 1, 1951.

Mr. Wulff: That is right.

Mr. Scalora: This agreement is between Southern Pacific Equipment Company and Southern——

[fol. 1487] Mr. Dunne: And George Smith.

Mr. Scalora: And George Smith.

The Court: Smith and Wiley.

Mr. Scalora: And H. J. Wiley, hereafter called purchasers.

The Court: That includes the first how many cars?

Mr. Dunne: 528 that went under Series EE.

Mr. Scalora: May I point out to your Honor that according to this contract of April 1st which included the first 528 cars the shipment and delivery were to be to purchasers in Oregon, Nevada, Arizona by delivery by the builder, Southern Pacific Company, a corporation.

The Court: That is in line with the testimony except that it has been testified that none were delivered to Arizona.

Mr. Scalora: And payment was to be made within thirty days after delivery at destination.

The Court: That is Exhibit 6?

Mr. Wulff: That is correct:

Mr. Dunne: Yes.

(The document last above referred to was by the clerk then marked Plaintiff's Exhibit No. 6 in evidence.)

Mr. Dunne: I am going to re-read this because I may have misunderstood Counsel. I thought he said by builder, Southern Pacific Company. It reads delivery by builder to Southern Pacific Company, a carrier, by railroad for shipment.

Mr. Scalora: That is correct, Southern Pacific would be the carrier.

[fol. 1488] Mr. Dunne: Now, so that Counsel may understand, Smith and Wiley are simply two men who are acting

for the Pennsylvania Company for Banking and Trusts and they have acquired these contracts, they then in turn undertake to assign certain contracts which they have acquired through the Pennsylvania Company for Banking and Trusts, and this is that agreement which is dated April 13th and includes a lot of other equipment, but in Item 6 it includes these 528 cars.

The Court: That is an assignment from Smith and Wiley to whom?

Mr. Scalora: Yes, sir, they assign it to Pennsylvania Company for Banking and Trusts.

Mr. Wulff: That is the purchaser to the trustee.

Mr. Dunne: What they do, Counsel, is assign their contract to acquire those cars. This is in the beginning.

Mr. Wulff: You see the date of it there.

The Court: That is a preliminary contract looking forward to an assignment.

Mr. Wulff: That is it.

Mr. Dunne: So that the trustee has a hold of the agreement to construct the cars during the construction period and the title is in the trustee.

The Court: That is dated prior to any activity at all, isn't it?

Mr. Scalora: That is in April, isn't it?

[fol. 1489] Mr. Dunne: April 13th is the date of that.

Mr. Scalora: It was signed April 13th.

Mr. Wulff: Of 1950.

Mr. Dunne: No, 1951.

The Court: 1951.

Mr. Scalora: That is right.

Mr. Wulff: They started on May 1st.

Mr. Scalora: But apparently, as I understand it, the purchasers, Smith and Wiley, are assigning their rights under that agreement dated April 1, 1951, to the Pennsylvania Company called trustee.

Mr. Wulff: That is correct.

Mr. Scalora: Although they enter into this agreement of April 13th. I imagine, your Honor, this agreement contemplates that activities occurring in the future in which Smith and Wiley would become purchasers, thirty days after delivery, assuming everything was proper, that trus-

tees would receive all the rights and benefits under this particular agreement.

Mr. Dunne: That is right.

Mr. Wulff: That is right.

Mr. Scalora: It would simply permit them to act as agents for the trustee.

The Court. That is Exhibit 7.

(The document last above referred to was by the clerk then marked Plaintiff's Exhibit No. 7 in evidence.)

[fol. 1490] Mr. Dunne: Then the next step, when the cars are completed and ready for the delivery is that billing which is already in evidence, those three bills for these 528 cars under Equipment Trust Series EE, and then to technically carry title over Southern Pacific Equipment Company has executed to Smith and Wiley three bills of sale.

The Court: Those bills of sale are from whom?

Mr. Dunne: Southern Pacific Equipment Company to Smith and Wiley.

Mr. Scalora: To the Pennsylvania Company for banking and trusts according to these bills of sale, you Honor, in consideration of $1.00 paid by Pennsylvania Company for Banking and Trusts under the agreement of April 1st made by George Smith and H. J. Wiley and for other valuable consideration they do convey, sell, transfer and deliver unto the Pennsylvania Company.

Mr. Dunne: I misunderstood. I said title went to Smith and Wiley. It doesn't. It goes directly to the trustee.

Mr. Scalora: It goes directly to the trustee and each bill of sale is different depending on the number of cars that were delivered, I guess.

Mr. Dunne: That is correct.

The Court: There are three of those?

Mr. Dunne: Three of those.

Mr. Scalora: There are three of those.

The Court: They will be Exhibit 8-A, B and C.

[fol. 1491] (The documents last above referred to were by the clerk then marked Plaintiff's Exhibits Nos. 8-A, B and C in evidence.)

Mr. Wulff: I might point out that all of this illustrates the entire transaction.

Mr. Dunne: That is correct, and we have endeavored as far as we can to get the documents that cover these actual cars.

Then in that series of steps, the last one is the Equipment Trust and Lease Agreement, which are already in evidence, and the Sub-Lease to T. & N. O. which we dug up this morning. Now, so that you may also understand how this operates, Counsel, although one of the witnesses might be able to tell us, this will illustrate the way in which Southern Pacific Equipment Company buys materials or parts from outside manufacturers. I happen to have a hand brake company, another from Modern Railway Devices, Incorporated. These are dated September 25, 1950. I would suspect that they were not part of this program, but I am handing them to you only as illustrative of the way the transactions are handled.

The Court: I think we will take the afternoon recess for about ten minutes and, Counsel, you can go over this matter with Mr. Scalora.

Mr. Dunne: Surely.

(Recess.)

Mr. Dunne: Now, if your Honor please, in one or two instances these documents that we have used are our only copies and may it be stipulated that at an appropriate time [fol. 1492] we can have them photostated and substitute the photostats?

Mr. Scalora: I would join in such a stipulation.

The Court: That will be so understood.

Mr. Dunne: Thank you, your Honor. Now, I was showing Counsel this simply by way of example, Purchase Orders for outside shops by the Southern Pacific Equipment Company. I offer them only as illustrative.

The Court: Those are admittedly not concerned with the cars in question?

Mr. Dunne: I cannot so identify them, your Honor.

Mr. Scalora: They are dated September 25, 1950, so I hardly believe that they would apply to the particular 1000.

The Court: Now, Counsel, as I understand it, is offering them to you for illustration only.

Mr. Dunne: That is right.

Mr. Scalora: Is this signature, G. M. Gutterman, the same individual who was designated as the consignee?

Mr. Dunne: That is correct, if it is the same name.

Mr. Scalora: And he is an employee of the Southern Pacific Equipment Company?

Mr. Dunne: If he is an employee, I wouldn't want to mislead you that he is an employee in the sense he is paid, but he does act for the Southern Pacific Equipment Company. That is my information.

Mr. Scalora: We have no objection to their going in evidence as the exhibit next in order.

[fol. 1493] The Court: That is Exhibit 9, I think, Mr. Clerk.

The Clerk: That is right.

The Court: A and B.

(The documents last above referred to were by the clerk then marked Plaintiff's Exhibits 9-A and 9-B in evidence.)

Mr. Dunne: Now, another example, if your Honor please, to indicate when equipment is ordered, from outside manufacturers, we have a photostatic copy of the invoice from the manufacturer and what appears to be a bill, and then the statement of account approved for voucher of Southern Pacific Equipment Co. And this one appears to be from Consolidated Western Steel Corporation for sides. See if I am correct on that. Yes, for sides for these very gondola cars on order or program P-3061, and it shows on its face that it refers to that program, although it shows that they were for unpledged cars, so that they were for the last 92 cars.

The Court: That would be the last 92 of this program?

Mr. Dunne: Of this program, yes, your Honor.

Mr. Scalora: Those are the last 92 as I recall that did not bear trust receipts indicating the Pennsylvania Trust?

A. I would like to correct that. You drew that conclusion from the account in the Equipment Company. None of the equipment is treated as pledged. It is all unpledged. The whole order will go through that particular account and finally out of the Equipment Company accounts.

[fol. 1494] Mr. Dunne: That was my mistake. I think you must be right.

A. They all go through that.

Mr. Scalora: I think if you will recall the testimony of Mr. Hitke he stated that all of the cars to his recollection had the stencil on them except that the last portion thereof failed to have that stencil on there. Do you remember that testimony, your Honor?

The Court: Yes, that is right.

Mr. Scalora: And then I think that Counsel, Mr. Dunne, indicated that the last 92 cars thereof failed to have that stencil.

Mr. Dunne: That is right, they were free assets, but I assumed because it said here equipment unpledged that this referred to the last 92 and the witness is correcting me.

The Court: We might have this witness explain what the status of those last 92 cars would be.

A. None of the equipment built under any of the orders on the books of the Equipment Company is considered pledged.

Mr. Dunne: Oh, I see.

A. It is only when it is financed and eventually sold to the Southern Pacific Company that it would become a pledged piece of equipment.

Mr. Dunne: Well, that was my mistake.

A. We manufacture and bill for all the materials.

Mr. Dunne: That was my incorrect inference.

[fol. 1495] The Court: When you say we——

A. (Interposing) The S.P. Equipment Company.

The Court: You mean the Southern Pacific Equipment Company?

A. Yes.

Mr. Scalora: Q. If I understand you then, Mr. Maurer, insofar as Consolidated is concerned, when an order is placed with the Southern Pacific Equipment Company it is not regarded as pledged because the Southern Pacific Equipment Company could use it any place and anywhere and not in particular on the particular gondola car?

A. Well, the equipment is purchased, as you will see in the order P-3061, and we make the accounting under that order when the invoice comes and we treat all the accounting

as applying to the order 3061. It is designated for this particular program. We could not use it on others.

Q. Then as an actual fact Pennsylvania Bankers, Banking and Trust, would have no claim at all whatsoever to that particular piece until it actually goes into the particular gondola car?

A. Once the car is delivered and the Pennsylvania Company, Trustee, takes over after delivery, only then does it become the owner.

Q. Well, could you explain this to me, Sir, then if that is true, why is it that while it is in the Sacramento Shop on a track and in the possession of Southern Pacific Company, in the process of being completed and readied for shipment out of state, why is a trust receipt placed on each car indicating that Pennsylvania Company for Banking and [fol. 1496] Trusts are trustee, owner and lessor?

A. The intention is to eventually mortgage it.

Q. In other words, then at the time that the trust receipt appears here in the Sacramento Shops indicating Pennsylvania Company—give me the labeling. No, I am referring —I think I specifically questioned the witness as to whether he ever saw a trust receipt or a mortgage plate on the car.

The Court: You are speaking of the stenciling on the car?

Mr. Wulff: Stenciling and labeling.

Mr. Scalora: That is right, and I think he saw the stencil on the car with the words Trustee, Owner and Lessor, Pennsylvania Company for Banking and Trusts.

The Court: There is no question about that.

Mr. Scalora: Q. You state even though they appear on the cars in Sacramento while being constructed you only contemplate in the future at the point of delivery if they pass inspection that you will then authorize the voucher and title will pass?

A. That is correct, the Pennsylvania Company does not own the equipment with the plate on it here as furnished.

Q. Well then I take it that according to your accounting records the actual ownership would be in Southern Pacific Equipment Company?

A. Correct.

Q. Now, Southern Pacific Company, a corporation, merely appears as the builder then?

A. The Southern Pacific Equipment Company is the builder.

[fol. 1497] Q. Here in the General Shops in Sacramento?

A. Yes, the Equipment Company.

Q. When you refer to the Southern Pacific Equipment Company are you referring to the exact same company as when you refer to Southern Pacific Company, a corporation?

A. No.

Q. Well now, they are two different companies, are they not?

A. Correct.

Q. For example now if I were to hold 1000 shares in Southern Pacific Company, am I entitled to receive dividends from Southern Pacific Equipment Company?

A. No.

Q. Well then, Sir, the actual builder is Southern Pacific Company, a corporation?

Mr. Dunne: I think what we are getting into——

Mr. Wulff: (Interposing) The documents are in evidence.

The Court: It is argumentative. You can explain what you mean by saying that the Southern Pacific Equipment Company is the builder. You see, what counsel has in mind, it has been testified here that the Southern Pacific Company furnishes the labor and the shops.

Mr. Scalora: Correct.

Mr. Dunne: I think, if your Honor please,——

The Court: (Interposing) So, I think that is what Counsel refers to when he says the company is the builder, because they furnish the labor and shops.

[fol. 1498] Mr. Wulff: If your Honor please, Exhibit Number 5 clarifies that. It is all covered by Exhibit Number 5, the written agreement between the Equipment Company and the Southern Pacific Company.

The Court: While this witness is on the stand I think he can explain it.

Mr. Scalora: Q. Mr. Maurer, will you tell us what you meant when you referred to Southern Pacific Equipment Company as the builder?

A. As a corporation it is considered and treated as a builder, as one of the things that it does. The orders for material are made by the Southern Pacific Equipment Company and is accumulated here; and under the agreement referred to the Southern Pacific Shops and help is used and in turn they bill us for the labor performed in that monthly.

Q. But the act, physical act of building, that was done in the general shops of Sacramento at Car Shop. 9 by the Southern Pacific Company, a corporation, insofar as the 1000 gondola cars are concerned?

A. That is a car on this particular program which is only a part of our business.

Q. That is correct. I am referring only to this particular program now. In that particular instance according to your accounting records the Southern Pacific Equipment Company was regarded as the owner of that property and Pennsylvania Banking and Trust did not become the owner until a period of thirty days after delivery at the point of [fol. 1499] destination if they approved the particular cars that were built and passed the inspection on them?

A. That is correct.

Q. Now, let's go at it this way, do you know where the Southern Pacific Equipment Company was incorporated?

A. It was incorporated in California.

Q. Now, where was the Southern Pacific Company, a corporation, incorporated?

A. Originally Kentucky, now in Delaware, however.

Q. They operate under two completely different corporate charters then?

A. Correct.

Mr. Dunne: I am not so sure that that is correct. It is a matter of transferring from Kentucky to Delaware. A new corporation in Delaware transferred over the assets and the new corporation assumes the liabilities.

Mr. Scalora: At least in this respect that the power to exist in law that is enjoyed by Southern Pacific Equipment Company flows from the articles of incorporation that they received in the State of Kentucky.

Mr. Wulff. It is all a question of law, if your Honor please.

The Court: Yes, I think it is. Perhaps Counsel here

could assist you. There isn't any question but what they are two separate corporations as far as directors are concerned and there are no common stockholders.

[fol. 1500] Mr. Wulff: It is just a subsidiary.

The Court: It is a subsidiary, just the subsidiary. Southern Pacific Equipment Company is a subsidiary to S. P. Company.

Mr. Dunne: That is right.

The Court: Are there any interlocking directors?

Mr. Dunne: I think not. I know there are no common directors.

Mr. Scalora: Q. Do you know the answer to that?

A. I am sure there isn't, however I wouldn't say.

The Court: When you say it is a subsidiary, is the stock all owned by Southern Pacific Company?

Mr. Dunne: Yes, your Honor.

Mr. Scalora: In other words, there is only one shareholder of record of Southern Pacific Equipment Company and that is Southern Pacific Company, a corporation.

Mr. Dunne: I am not so sure that there is only one stockholder of record, but the substantial ownership is with Southern Pacific Company, that is correct.

Mr. Scalora: Q. Now, Southern Pacific Company, a corporation, has its own independent stock certificates, isn't that correct, which are issued to the public?

A. Yes, that is correct.

Q. And private persons may or have in the past purchased those stock certificates?

A. That is right.

[fol. 1501] Q. And by reason of so holding and owning a stock certificate in Southern Pacific Company, a corporation, they are not entitled to dividends from Southern Pacific Equipment Company?

A. I would presume not.

The Court: Well I don't know whether he can answer that.

Mr. Scalora: If he knows that.

Mr. Wulff: I think the presumption should go out, your Honor. If he knows, fine.

The Court: I will sustain it. I think that would be a

legal matter anyway and I think Counsel have practically answered it themselves. If the Equipment Company is a subsidiary obviously any profit and loss accounts of that company would inure to the credit of the stockholders in the Southern Pacific Company.

Mr. Scalora: Q. Mr. Maurer, can you tell from your corporate account records whether Southern Pacific Company, a corporation, pays the California sales tax on the sale of any of these gondola cars?

Mr. Wulff: I think that is immaterial whether a sales tax is paid. It all depends on whether a sale is consummated in California or outside of California.

The Court: I will overrule it. I think it may be preliminary. You are asking if the Southern Pacific Company pays it?

Mr. Scalora: Southern Pacific Company, a corporation.

Mr. Wulff: For what purpose?

Mr. Scalora: As the Court points out it is only preliminary. I am going to show the position of Southern Pacific [fol. 1502] Company, a corporation, in relation to dealing with the particular gondola cars. I am going to try to show that as Mr. Maurer has pointed out if Southern Pacific Equipment Company is a subsidiary and claims title has not passed on this transaction and that they do retain the title. Now, if this is just a subsidiary acting for the parent it becomes very pertinent here in the accounting setup to determine, one, whether a use tax is paid on these gondola cars or a sales tax.

The Court: Counsel, I have already ruled that it is admissible at this time.

Mr. Scalora: Q. Do you pay a sales tax?

A. We do, not on the——we do on the purchase of material.

The Court: Again when you say "we"; you mean the Equipment Company?

A. The Equipment Company.

Mr. Scalora: Q. Do you pay a sales tax on the sale of the gondola cars?

A. No.

Q. All right. Do you pay a use tax in the State of California for using the gondola car?

A. Not to my knowledge.

Q. Now, do you know if Southern Pacific Company, a corporation, ever makes out bills of lading which are filed with the Interstate Commerce Commission or the Railroad Commission in which they list as a destination and a trip and cargo the particular delivery of the gondola cars that are [fol. 1503] concerned here?

A. I wouldn't know that.

Q. Let me ask you this, Sir, whenever a railroad such as the Southern Pacific Company, a corporation, hauls merchandise, makes up a train, a freight train therein containing fruit, vegetables, steel, merchandise of all sorts, is it necessary for that corporation to make out a bill of lading and a bill of shipment which they must file with the Interstate Commerce Commission showing the point of destination, showing the consignee, consignor, showing the rate that is being charged, showing the time of leaving, time of arrival, do you know?

A. I wouldn't know that.

Mr. Dunne: I can tell you what that is and agree to it if it is important. There is a federal statute which requires the issuance of bills of lading and an order of the Interstate Commerce Commission, general order, has provided the form for the bills of lading. So that for practical purposes it is a matter of law that we are required to issue bills of lading in a given form. Those bills of lading show consignor, consignee, originating carrier, usually show the route, they show the description of the material, but my recollection is that they do not show the rates, that those are shown on the freight bill. As far as I know there is no requirement for filing those bills of lading anywhere. They are not required to be filed with the Railroad Commission or the Interstate Commerce Commission. Now, as to showing the time of leaving and the time of arrival, that data may or may not [fol. 1504] appear on the bill of lading, but the actual data of movement of a particular car is shown on another document that is known as a waybill, and that is an inter-railroad document, it is not a document that gets out into the hands of the public, but it is a record of the movement of

the car. Then the rates and what is to be collected are shown on what is known as a freight bill.

The Court: Is Mr. Dunne's statement accepted by you as a stipulation to the facts therein stated?

Mr. Scalora: I would be happy to stipulate, your Honor. I am quite sure that none of us here know that as well as Mr. Dunne does. He is very well versed in it.

The Court: I am inclined to believe that it is not of great importance at this time, but I will permit it and allow it in.

Mr. Scalora: I don't think I have any further questions of Mr. Maurer, your Honor.

Mr. Dunne: I have no questions.

Now, there are these other documents. There was that one which shows how we pay outside manufacturers and there is one other set of documents here, Counsel.

Mr. Scalora: May I at this time offer this in evidence as the next exhibit in order. This is — show how outside accounts are paid.

The Court: How are those described, are they invoices?

Mr. Scalora: These invoices are all headed Southern Pacific Equipment Company, statement of account approved [fol. 1505] for voucher.

Mr. Dunne: Now, if I may correct you, that is not exactly accurate. The two bottom ones are invoices for the supplies and material in this case, Consolidated Western Steel Corporation and the top one which is a Southern Pacific Equipment Company form, is a statement of account approved for voucher. That is the authorization to issue the voucher for payment.

The Court: That consists of three pages?

Mr. Dunne: Three pages, your Honor, and they are clamped together.

The Court: That is Exhibit 10-A, B and C?

Mr. Scalora: Yes, sir.

(The documents last above referred to were by the clerk then marked Plaintiff's Exhibits 10-A B and C in evidence.)

Mr. Dunne: That is on the material side. Now, on the labor side, this appears to cover the labor for the actual month of injury here, June, 1951. The bottom sheet is a

detail of a bill collectible by Southern Pacific Equipment Company to the payer, Southern Pacific Company to the payer Southern Pacific Equipment Company. It is a bill collectible for which that is the detail, and then again on the top is Southern Pacific Equipment Company statement of account approved for voucher, which again is the authorization to pay that labor bill.

The Court: Very well, they may be so introduced.

Mr. Wulff: That is number 11, your Honor?

[fol. 1506] The Court: That is 11-A, B and C.

(The documents last above referred to were by the clerk then marked Plaintiff's Exhibits 11-A, B and C in evidence.)

Mr. Dunne: I am sorry I exeused Mr. Maurer. May I recall him, your Honor, for just a few questions?

The Court: Yes.

Redirect examination

By Arthur B. Dunne, Esq., counsel on behalf of the defendant herein:

Q. Mr. Maurer, you have heard our agreements here and statements made and then you have given some testimony of Southern Pacific Equipment Company getting some cars that are put together, physically put together in the Southern Pacific Shops. Now, does Southern Pacific Equipment Company do that same thing with P. F. E. cars and P. F. E. Shops at Roseville?

A. Yes.

Q. And does it also buy cars from outside manufacturers such as Pullman, Standard Pressed Steel and others?

A. It does.

Mr. Dunne: I have no further questions.

Recross-examination

By Anthony J. Scalora, Esq., counsel on behalf of the Plaintiff herein:

Q. Is that all part of the program that was adopted in September, 1950?

Mr. Dunne: August, 1950, Counsel.

[fol. 1507] A. We have had a continuing program since 1948. A large part of the $4,000,000 worth of equipment has been built by the Equipment Company.

Q. By the way, you had an opportunity to see the resolution that was adopted both by Southern Pacific Equipment Company and Southern Pacific Corporation?

A. Yes.

Q. And I take it since it states therein that the President of the United States has pointed out this to all railroad carriers that there is a critical shortage of freight carriers, that the same type of thing was probably sent to all major railroad transportation corporations in the United States; in other words, this is just part of a gigantic national building scheme, is it not?

A. It would seem that way, yes, sir.

Q. Do you have any actual knowledge, Mr. Maurer, that it is?

A. No, I don't.

Q. I thought it may have been called to your attention.

A. I think I have read something along that line in the papers.

Q. And this is the part that Southern Pacific Company, a corporation, and Southern Equipment Company are playing in this scheme?

A. Yes, to my knowledge.

Q. And as an actual fact then a great many of the freight cars or new gondola cars would be released into the market and may go to corporations other than Pacific Equipment Company and Southern Pacific?

[fol. 1508] A. Built by the S. P. Equipment Company.

Q. Yes, sir, that is correct.

A. We construct for the Pacific Fruit Express and Southern Pacific Company.

Q. And you state that Southern Pacific Equipment Company also engages in construction work?

Mr. Wulff: That is what he just testified to.

A. Yes.

Mr. Scalora: Q. Well, when you say "we", that is the thing that bothers me.

The Court: That is the Equipment Company he is speaking of.

A. Southern Pacific Equipment Company.

Mr. Scalora: Q. You are referring to the Southern Pacific Equipment Company?

A. Yes.

Q. You are not referring to Southern Pacific Company, a corporation?

A. Southern Pacific Equipment Company.

Q. You construct, you say, for Pacific Fruit Express?

A. Yes.

Q. And what other corporation, your own?

A. And Southern Pacific Company.

Q. And Southern Pacific Company?

A. Yes.

Mr. Scalora: All right, that is all.

Redirect examination

By Arthur B. Dunne, Esq., counsel on behalf of defendant herein:

[fol. 1509] Q. Now, wait a minute, to keep the record straight so that there will not be any misunderstanding, Pacific Fruit Express Company is a company that is owned by Union Pacific Railroad Company and we just act as supplier of refrigerator cars for those two companies, the Pacific Western Railroad Company, that is correct, is it not?

A. Yes.

Mr. Scalora: Not Western.

Mr. Dunne: Yes.

Q. We supply P.F.E. supplies Western Pacific with the same service as S. P. and U. P.?

A. Jointly owned S. P. and U. P.

Q. That is right. I speak with some confidence because I had an occasion to go into it with a very great detail involving that recently.

The Court: Any further questions?

Mr. Scalora: No.

The Court: By the way, I do not think I got your entire title. Chief Clerk?

A. Corporate Accounts Bureau.

The Court: Corporate Accounts Bureau?

A. Assistant General Auditor's Office.

The Court: Of what?

A. The Southern Pacific Company.

The Court: The Southern Pacific Company?

A. Yes.

[fol. 1510] Mr. Dunne: Q. And then in that same capacity, you also act in the same capacity for Southern Pacific Equipment Company as auditor, do you, or Chief Clerk?

A. In my particular bureau we handle only corporate properties, Southern Pacific Equipment Company, Southern Pacific Land Company.

The Court: Sometimes when you say "we,"—

A. I mean the Corporate Bureau, my Bureau handles only corporate properties.

The Court: That is a bureau of the Southern Pacific Company?

A. That is correct.

The Court: A while ago when you referred to "we", you were referring to Southern Pacific Equipment Company. Does your title hold in both corporations, the same title that you have, Chief Clerk?

A. Well, my title is for the Southern Pacific Company and in the Bureau or the Office of the Assistant General Auditor, and we handle corporate properties.

Mr. Dunne: I think perhaps I can explain what your Honor has in mind. Southern Pacific Company has an accounting department and in that accounting department there are segregated in one bureau the handling of accounts for other corporations for whom Southern Pacific Company handles the accounts, its various subsidiaries, some of them fully owned, some of them partially owned.

[fol. 1511] The Court: What I want to know is whether this gentleman has any official title in the other corporations.

Mr. Scalora: May I ask a question?

The Court: Do you in the Equipment Company?

A. No, I do not.

Recross-examination

By Anthony J. Scalora, Esq., counsel on behalf of the Plaintiff herein:

Q. Would that be, Mr. Maurer, purely for the interest of the Southern Pacific Company, a corporation, or in addition thereto is it for the interest of Southern Pacific Equipment Company or will they maintain their own accounts and books?

A. Its own accounts, and I don't think it is important, but we do in some instances, it is done under express contract, it is done as a contract proposition to provide accounting services for the fee that is paid in some instances.

Q. In effect your Bureau is the actual Accounting Bureau for the Southern Pacific Company, a corporation?

A. My Bureau—not for Southern Pacific Company. The books are kept in another department. I do in my Bureau, the Corporate Accounts Bureau, we prepare the balance sheet and the general books and make up the company's reports, we make the settlement with the trustee and handle all the phases of bookkeeping on the S. P. Equipment Company and others. I can mention half a dozen other or more corporations.

Q. You do for Southern Pacific Company, a corporation, [fol. 1512] only so far as they are interested as the stockholder that would own a major part, the whole part or any part of any subsidiary like Southern Pacific Equipment Company?

A. Yes.

Q. You don't prepare a balance sheet, for example, and send it out, send out a statement to stockholders of the Southern Pacific Equipment Company to the Southern Pacific Corporation, the majority stockholder, do you?

A. In my Bureau we send out no stockholders' reports.

Q. And you do not do the corporate accounting work for Southern Pacific Equipment Company?

A. We do the corporate accounting for the Equipment Company, yes.

Q. And you don't have any other independent accounting setup to your knowledge?

A. Well,——

Q. They don't have any other independent accounting setup?

A. Our auditors' office, of course, is quite extensive.

The Court: I am a little confused.

Mr. Scalora: Q. I thought that the arrangement would be simply that Southern Pacific Company, a corporation, as a majority stockholder would be interested in a subsidiary and would handle the auditing of accounts and corporate records as far as their interest is concerned, but that it would not be——

The Court: Is there a separate accounting staff for the two corporations or is it all done by the Southern Pacific Company or substantially all done?

[fol. 1513] A. We are all in the same building. I get an S. P. Company pay check and the employees in my Bureau.

The Court: But you do handle the accounts for the Equipment Company?

A. Yes.

The Court: Under this Bureau?

A. That is correct.

The Court: While you don't handle or, I mean to say, hold any official title with it, you do that by virtue of your ex officio job with the Southern Pacific Company?

A. That is right.

Mr. Dunne: That is right.

Mr. Wulff: That is correct.

Mr. Scalora: Now, at this stage—that is all, thank you—at this stage, your Honor, I am ready to rest my case with the last thing being—and I don't know my position here because I don't know what Counsel for the defense wants, and that is this, just the question of what the worker himself was actually doing at the time, and if we can reach that through a stipulation only for the purpose of going to this jurisdictional question——

Mr. Wulff: It is already agreed upon that he was working between Car 506 and 507 at the time he was injured, which is a part of 2807.

Mr. Scalora: The Court is interested in what station he [fol. 1514] was at.

The Court: I think you ought to have something in the record, Gentlemen, to show the basic facts on which this whole case is predicated, namely, that the plaintiff was doing such and such, and so on.

Mr. Dunne: I think this is the fact, he was a member and had been on this program 3061 in the riveting gang at what station, Mr. Maurer?

A. Well,——

Mr. Dunne: He was riveting in some sides?

A. That is right.

Mr. Dunne: Riveting ends and sides. What station was it on the line, do you know approximately?

Mr. Maurer: Between 12 and 13 on the end of the cars.

Mr. Dunne: On the ends of the cars between 12 and 13.

The Court: Was he a member of one of these riveting crews?

Mr. Wulff: A crew of four.

The Court: A crew of four?

Mr. Dunne: Yes.

The Court: Is that acceptable to you, Mr. Scalora?

Mr. Scalora: Is that the way it was?

Mr. Dunne: Yes.

Mr. Scalora: Yes, your Honor.

The Court: Then he is in the riveting crew of four as has already been testified to on the assembly line.

Mr. Wulff: Working between the shop numbered cars 506 and 507.

[fol. 1515] Mr. Scalora: That is correct, 506 and 507.

The Court: I was of the impression that there was some question here whether or not he didn't have something to do with a defective rivet.

Mr. Scalora: That is correct. If you want testimony on that——

Mr. Wulff: That is immaterial in this phase, your Honor.

Mr. Dunne: That went to the negligence, your Honor.

The Court: Of course, we do not want to go into that.

Mr. Wulff: What happens there is these rivets are done

and the inspector comes along and marks those which are defective. If they are defective they must be renewed, they are removed and a new rivet put in.

The Court: Are they put in by the same crew?

Mr. Wulff: That is right, but they are marked by the inspector and the same crew removes the rivet and puts the new one in, but it has no materiality here at all.

The Court: Couldn't it be stipulated the testimony that is already in will establish that the plaintiff was a member of the riveting crew?

Mr. Scalora: That he was a carman's helper working for the Southern Pacific Company, a corporation, working on the new cars.

Mr. Dunne: That is correct.

Mr. Scalora: As the record shows the testimony to be. [fol. 1516] The Court: Very well. Is there anything further?

Mr. Dunne: Mr. Wulff, because some slight question was raised about it this morning has a suggestion, I assume there will be no objection, that we supply for the record a copy of the Articles of Incorporation of the Southern Pacific Company, a Delaware Corporation. They have been filed here in Sacramento.

Mr. Wulff: To show its chartered purposes.

The Court: If there is no objection to it, Mr. Scalora.

Mr. Scalora: No. No.

The Court: That may be admitted.

Mr. Wulff: We will supply that and let it take the next number.

The Court: As part of the Plaintiff's case?

Mr. Dunne: Well, we will put it in.

The Court: Put it in as Defendant's Exhibit A.

Mr. Scalora: Number 1?

The Court: A.

Mr. Scalora: A.

The Court: You haven't introduced anything?

Mr. Wulff: That is right.

Mr. Dunne: That is right.

The Court: Defendant's Exhibit A.

Mr. Wulff. What is the Court's pleasure about submission of this?

The Court: Well, I understand that you had a conversation yesterday in one of the other departments about speedy dispatch of these decisions. Have you any sugges- [fol. 1517] tion as to how that can be done? I understand there is a possibility of its being tried this way on the issue of fact without a jury and then to go ahead with the jury.

Mr. Wulff: That is not this case. This case may go on this issue by itself.

The Court: This case is off calendar?

Mr. Wulff: That is correct.

Mr. Scalora: That is right, your Honor.

Mr. Wulff: I think this could be fully presented by briefs. Isn't that correct?

The Court: Well, I was going to say that I do not see how it is possible for a court to give this matter due consideration in any fairly short length of time.

Mr. Scalora: No, I don't think so.

The Court: I do not see how you could treat this as you would a motion for nonsuit and then rule on it and go right ahead.

Mr. Scalora: We can't do it in this instance.

The Court: How much time do you gentlemen need?

Mr. Wulff: That is up to you.

Mr. Scalora: It is immaterial to me. I am not in any particular hurry.

Mr. Wulff: There is no need of the Court getting into it until after his vacation.

The Court: I think Counsel can start on the briefs.

[fol. 1518] Mr. Scalora: When will you return, your Honor?

The Court: I will be gone the first three weeks of July. Thirty, thirty and fifteen or something like that?

Mr. Wulff: That is agreeable.

Mr. Dunne: Quite agreeable. And may we have that time start after receiving the transcript, if your Honor please?

The Court: You are asking for a transcript of the record?

Mr. Wulff: Yes.

Mr. Dunne: We would like this written up.

The Court: Very well then, the time will start when the

transcript has been received by Counsel. Plaintiff will open and thirty, thirty and fifteen.

Mr. Scalora: Thirty from the time that the transcripts are received?

The Court: Thirty, thirty and fifteen. It will be submitted.

Mr. Wulff: It is okay with me.

Mr. Scalora: I am satisfied.

[fol. 1519] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 1520-21] In Supreme Court of California, Sacramento County

Sacramento No. 6523

Hon. Brown, Judge

Charles Eelk, Plaintiff and Appellant

vs.

Southern Pacific Co., a Corp., Defendant & Respondent

For App.: Anthony J. Scalora, 521 Ochsner Building, Sacramento 14.

For Resp.: Devlin, Diepenbrock & Wulff, 1212 Calif. State Life Building, Sacramento.

Docket Entries

July 30, 1954. Transferred to Supreme Court, June 19, '53. Filed Transcript C. R1. Appeal from J. June 19, '53, Lodged Exhibits.

August 3, 1954. Lodged Exhibits, Pltfs: 1, 3, 4, 5, 6, 7, 2a, 2b, 3c, 8a, 8b, 8c, 9a, 9b, 10a, 19b, 10c, 11a, 11b, 11c. Defts. A.

Nov. 1, 1954. Ordered on Bank Calendar, San Francisco, Dec. 6, 1954.

Nov. 24, 1954. Filed So. Pac. Co., memo of oral argument.

Dec. 6, 1954. Causes called. Arthur B. Dunne argued for

appellant and respondent Southern Pacific Company in all five cases. Mr. Hildebrand and Mr. Probst argued for respondent Gileo in S.F. 19090. Thomas C. Perkins argued for appellant Eufrazia in SAC 6522. Mr. Colley argued for appellant Moreno in SAC 6520 and for respondent Aranda in SAC 6521. Mr. Scalora waived oral argument for appellant Eelk in SAC 6523. Submissions deferred.

April 29, 1955. Submitted.

April 29, 1955. By the Court: Judgment is reversed.

May 31, 1955. Remittitur issued.

[fol. 1522] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA, IN BANK

CHARLES EELK, Plaintiff and Appellant

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, Defendant and Respondent

OPINION—April 29, 1955

By the Court:

Plaintiff, who was employed by defendant railroad company as a carman helper, was injured while working on the construction of new railroad cars, and he brought this action under the Federal Employers' Liability Act. Before trial of the other issues, the court held a hearing on the question of whether the federal act was applicable and concluded that it was not. Judgment was entered accordingly, and plaintiff appeals.

Defendant first employed plaintiff on November 7, 1950, and assigned him to repairing railroad cars already in service. He was placed on construction of new railroad cars from December 1 until January 8, 1951, at which time, [fol. 1522a] apparently due to a shortage of construction materials, he was reassigned to repairs. On February 13, he again started doing new construction work, and he was so engaged exclusively until June 22 when he was injured while riveting sides on a new gondola car. The construc-

tion project was the same as that involved in Gileo v. Southern Pacific Company, ante, p. —, this day decided, where a welder was injured while working on one of the gondola cars. The factual situations in the two cases are substantially similar, and our decision holding the act applicable to Gileo is controlling here.

The judgment is reversed.

[fol. 1523] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SAC No. 6523

On Appeal from the Superior Court in and for the County of Sacramento

CHARLES EELK, Plaintiff & Appellant

vs.

SOUTHERN PACIFIC COMPANY, Defendant & Respondent

JUDGMENT—April 29, 1955

The above entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered, It Is Ordered, Adjudged, and Decreed by the Court that the judgment of the Superior Court in and for the County of Sacramento in the above entitled cause, be and the same is hereby reversed.

Appellant to recover costs on appeal.

I, William I. Sullivan, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 29th day of April, 1955, and now remaining of record in my office.

Witness my hand and the seal of the Court, affixed at my office, this 31st day of May, A.D. 1955.

William I. Sullivan, Clerk, by Paul Dinoia, Deputy.
(Seal.)

[fol. 1524] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 1525] IN THE DISTRICT COURT OF APPEAL, STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT

3 Civil No. 8481

CHARLES EELK, Plaintiff and Appellant

v.

SOUTHERN PACIFIC COMPANY, a Corporation, Defendant and Respondent

CERTIFICATE OF CLERK

I, L. A. Endres, Clerk of the District Court of Appeal, State of California, Third Appellate District, do hereby certify as follows:

The above entitled action was appealed to the above entitled Court from the Superior Court of the State of California in and for the County of Sacramento; briefs were thereafter filed in this Court by the parties to said action and said action was, by stipulation of the parties and Order of Court set down for oral argument and was argued before the above entitled Court upon the same day that argument was had in *Roque Aranda* v. *Southern Pacific Company*, 3 Civil No. 8388, *Albert Eufrazia* v. *Southern Pacific Company*, 3 Civil No. 8428, and *Epimenio Moreno* v. *Southern* [fol. 1526] *Pacific Company*, 3 Civil No. 8363. Prior to submission of the above entitled cause and prior to any decision, judgment or opinion by the above entitled Court the above entitled action was, by Order of the Supreme Court of the State of California, transferred to the Supreme Court of the State of California and the file in said action was thereupon transmitted to the Clerk of the Supreme Court of the State of California.

There is no decision or opinion or judgment of the above entitled Court in the above entitled cause.

Witness my hand and the seal of the Court this 21st day of June 1955.

L. A. Endres, Clerk of the District Court of Appeal, State of California, Third Appellate District.
(Seal.)

[fol. 1527] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1955

No. 257

SOUTHERN PACIFIC COMPANY, Petitioner

vs.

CHARLES M. GILEO ET AL.

ORDER ALLOWING CERTIORARI—Filed October 10, 1955

The petition herein for a writ of certiorari to the Supreme Court of the State of California is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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FILED
JUL 22 1955
HAROLD B. WILLEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM 1955

No. 257

SOUTHERN PACIFIC COMPANY,
a Corporation,
Petitioner,

v.

CHARLES M. GILEO, EPIMENIO MORENO, ROQUE ARANDA, ALBERT EUFRAZIA and CHARLES EELK

Petition for Writ of Certiorari to the Supreme Court of the State of California to Review Five Cases Involving Identical or Closely Related Questions

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In the Supreme Court of the United States

OCTOBER TERM 1955

No. .....

SOUTHERN PACIFIC COMPANY, a Corporation, *Petitioner,*

v.

CHARLES M. GILEO, EPIMENIO MORENO, ROQUE ARANDA, ALBERT EUFRAZEA and CHARLES EELK

Petition for Writ of Certiorari to the Supreme Court of the State of California

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable the Associate Justices of the Supreme Court of the United States:

On April 29, 1955, the Supreme Court of California decided 5 cases, then pending in that court, entitled and numbered as follows:

Charles M. Gileo, Plaintiff and Respondent, v. Southern Pacific Company, a corporation, Defendant and Appellant, SF.No. 19090;

Epimenio Moreno, Plaintiff and Appellant, v. Southern Pacific Company, a corporation, Defendant and Respondent, Sac. No. 6520;

Roque Aranda, Plaintiff and Respondent, v. Southern Pacific Company, a corporation, Defendant and Appellant, Sac. No. 6521;

Albert Eufrazia, Plaintiff and Appellant, v. Southern Pacific Company, a corporation, Defendant and Respondent, Sac. No. 6522; and

Charles Eelk, Plaintiff and Appellant, v. Southern Pacific Company, a corporation, Defendant and Respondent, Sac. No. 6523.

These cases all involved "identical or closely related questions" (Rules U.S. Sup. Ct., Rule 23 subd. 5). In each a plaintiff-employee sued Southern Pacific Company, his employer, to recover damages for personal injuries received by him in the course of his employment. In each the plaintiff charged the defendant, as his employer, with negligence and based his action on the Federal Employers' Liability Act (45 USC § 51 ff). In each the defendant-employer asserted that the Federal Employers' Liability Act had no application because the activity in which the employer and employee were engaged was not common carriage by railroad but was manufacturing (*Gileo, Eufrazia* and *Eelk*, assembly line new car construction; *Aranda*, wheel making in a wheel foundry) or new construction (*Moreno*, construction of a new "retarder yard"). In each case the Supreme Court of California held that the Federal Employers' Liability Act applied and held against the position of Southern Pacific Company, the employer-defendant. Deeming itself aggrieved Southern Pacific Company, the defendant-employer, agreeably to subdivision 5 of Rule 23 of the Rules of the Court seeks review of the judgments of the

Supreme Court of California on writ of certiorari by filing this single petition for writ of certiorari covering all the cases.*

OPINIONS BELOW

Gilco v. Southern Pacific Company. The trial court rendered no opinion. The opinion of the District Court of Appeal of the State of California, First Appellate District, Division Two (R337-343; App. 5-12) is reported in 124 A.C.A.[1] 951 and 269 P2d 150. The opinion of the Supreme Court of California (R325-330; App. 13-17) is reported in 44 A.C.[2] 565 and 282 P2d 872. The opinions are appended as indicated.

Moreno v. Southern Pacific Company. The opinion of the trial court (R360, 361; App. 20, 21), filed on the granting of defendant's motion for judgment *n.o.v.* is not reported.[3] The appeal from the judgment was to the District Court

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*A single consolidated record, made up of copies of the typewritten records used below, is filed herewith.

Below each case had its own record separately paged and each of these records was made up of at least two sections (a Clerk's Transcript and a Reporter's Transcript), or more sections, each separately paged. Here, for convenience, the whole of the consolidated record has been paged consecutively throughout at the lower outer corner of the pages and all references herein to the record (R) are to this paging.

1. Advance California Appellate Reports, the advance sheets of the opinions of the District Courts of Appeal of the State of California. The Supreme Court of California having granted a hearing and transferred this case to the Supreme Court for decision the opinion of the District Court of Appeal will not be officially reported.

2. Advance California Reports, the advance sheets on the opinions of the Supreme Court of California. The opinion will be officially reported in 44 California Reports, 2d Series.

3. The court directed that judgment in favor of the defendant be entered upon the ground that there was no evidence of negligence on the part of the defendant. The opinion does not deal with the questions presented by this petition.

of Appeal of the State of California, Third Appellate District. By order of the Supreme Court of California the case was transferred to the Supreme Court of California before decision by the District Court of Appeal and, by consequence, there is no opinion of the District Court of Appeal (R627, 628). The opinion of the Supreme Court of California (R617-620; App. 23-25) is reported in 44 A.C. 572 and 282 P2d 877. The opinions are appended as indicated.

Aranda v. Southern Pacific Company. The opinion of the trial court (R1130-1134; App. 28-33), is not reported. The appellate procedure was the same as in *Moreno* and there is no opinion of the District Court of Appeal. (R1138) The opinion of the Supreme Court of California (R1122-1127; App. 35-38) is reported in 44 AC 569 and 282 P2d 875. The opinions are appended as indicated.

Eufrazia v. Southern Pacific Company. The opinion of the trial court (R1158-1170; App. 40-50) is not reported. The procedure on appeal was the same as in *Moreno* and there is no opinion of the District Court of Appeal. (R1351) The opinion of the Supreme Court of California (R1347, 1348; App. 54, 55) is reported in 44 AC 575, and 282 P2d 879. The opinions are appended as indicated.

Eelk v. Southern Pacific Company. The opinion of the trial court (R1366-1380; App. 57-70) is not reported. The proceedings on appeal were the same as in *Moreno* and there is no opinion of the District Court of Appeal. (R1525) The opinion of the Supreme Court of California (R1522-1522a; App. 74, 75) is reported in 44 AC 576 and 282 P2d 880. The opinions are appended as indicated.

JURISDICTION

The judgments of the Supreme Court of California sought to be reviewed, there being a separate judgment in each

case, were rendered and entered on April 29, 1955. (R325, 331, 617, 621, 1122, 1128, 1347, 1349, 1522, 1523) There was no order in any of the cases respecting a rehearing or granting an extension of time within which to petition for certiorari. The judgments have become final (California Rules on Appeal, Rule 24) so far as the court below is concerned and remittitures issued (California Rules on Appeal Rule 25) on May 31, 1955 (R331, 621, 1128, 1349, 1523). The statutory provision believed to confer on this Court jurisdiction to review the judgments in question by writ of certiorari is 28 USC § 1257(3) if the petition is presented within the time specified in the Rules of this Court, Rule 22 subd. 3, and 28 USC § 2101(c).

QUESTIONS PRESENTED FOR REVIEW

When an employer, which, as to some of its activities, is a common carrier by railroad engaged in interstate commerce, is manufacturing new equipment (freight cars and car wheels) or constructing new facilities (a "retarder yard") which will be, but have not yet been, placed in railroad service, and an employee, employed by it in such manufacturing or new construction, is injured in the course of his employment as the result of negligence of the employer can the employee maintain an action for damages under the Federal Employers' Liability Act, Act of Apr. 22, 1908, c. 149, § 1, 35 Stat. 65, as amended by Act of Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404 (45 USC § 51)?

More precisely, has the 1939 amendment of § 1 of the Federal Employers' Liability Act, which amended that section by adding the second paragraph, obliterated the theretofore established distinction between maintenance and repair which fell within the Act, and manufacturing and new construction to which the Act did not apply?

Has this amendment of 1939 made the sole test of applicability of the Act that of the second paragraph of § 1 added in 1939 so that the Act is applicable whenever any part of the duties of the employee is "the furtherance of interstate or foreign commerce: or shall, in any way directly or closely and substantially, affect such commerce" and has it eliminated the theretofore established **second** test under the **first** and unchanged paragraph (reenacted in 1939 without change) that for the Act to apply the **employer**, with respect to the activity in question, must be acting as a (1) "common carrier" (2) "by railroad" (3) in such commerce?

STATUTE INVOLVED

Each case involves § 1 of the Federal Employers' Liability Act, Act of Apr. 22, 1908, c. 149, § 1, 35 Stat. 63, as amended by Act of Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404 (45 USC § 1). The statute reads as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and child of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances,

machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

STATEMENT OF THE CASES

I. The Facts.

A. GILEO, EUFRAZIA AND EELK[4]

To meet the shortage in railroad equipment following World War II Southern Pacific Company (hereinafter referred to as SP) undertook a large program of acquiring new equipment for itself and others. Part of this program was to have outside financing. For part of this program the Board of Directors of SP on August 17, 1950, adopted a resolution for acquisition of 5,000 units of freight train equipment at an estimated cost of $25,797,500.00; 2,925 units for SP and 2,075 for Texas & New Orleans Railroad Company (T & NO). Included in the T & NO units were 1,000 gondola cars (gons) at an estimated cost of $4,300.00 each.[5] (R221, Def. ex. A.)

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4. The leading opinion of the Supreme Court of California was in *Gileo v. Southern Pacific Company*. In *Eufrazia* and *Eelk* that court noticed that "the construction project was the same as that involved in *Gileo v. Southern Pac. Co.*". Accordingly, unless otherwise indicated, we shall state the facts as they appear from the record in *Gileo* and the record references will be to the record in *Gileo*.

All record references are to pages of the transcript except that numbers following a colon refer to the line on the page indicated by the figure preceding the colon.

5. It is apparent from the lease (R 231ff) which is part of Def. Ex. H. (R 230) that this $25,797,500 program was itself only part of a larger program.

On September 15, 1950, Southern Pacific Equipment Company (SPEC), by resolution of its Board of Directors, determined to build 2,000 of the 5,000 units, including the 1,000 T & NO gons.[6] (R222, Def. ex. D). It was determined to build these 1,000 gons nos. T & NO 47,000 to 47,999, both inclusive, at the SP shops at Sacramento, California (R302). To this end SPEC purchased all the necessary materials (R67:4ff; 204:25ff)[7] and entered into a contract with SP under which SP agreed to furnish the necessary shop facilities and labor (R224, Def. ex. C). SPEC also entered into agreements, and agreements were entered into by others, for the fuller carrying out of the program as follows: The cars, when manufactured, would be delivered to The Pennsylvania Company for Banking and Trusts, trustee under an equipment trust, title would pass to the trustee, the trustee would acquire funds by the sale of equipment trust certificates, use these funds to finance the cars, after junior financing had been done, and then lease the cars to the SP with the privilege of subleasing to T & NO.[8]

At Sacramento, California, SP had general shops i.e., shops which in its organizational set-up were separate from the operating or transportation division. Included in these

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6. The estimated cost of the 2,000 units was $9,800,000 (R 222). Other equipment which SPEC undertook to acquire for the same general program it did not construct but bought from manufacturers. Such a transaction is illustrated by Def. Ex. N (R 300), SPEC's purchase order P-3071 placed with Pullman-Standard Car Manufacturing Company for 1,600, 40-foot 6-inch freight box cars of 100,000 pounds capacity each. SPEC also built cars for concerns other than S. P. (R 214:23).

7. Def. Ex. I and J (R 290, 292) are documents illustrative of the orders placed and method of payment.

8. The details are made to appear by the documents used, Def. Ex. D-H, incl. The obvious purpose of lease and sublease was to lend the credit of SP to the supplying of cars to T & NO.

shops was a passenger car shop and freight car shop No. 9. (R47:14ff; 136, 137; 198:13ff.)

Programs of constructing new cars at shop No. 9 began July 1, 1950 (R48:14ff; 199:23). At the time the plaintiffs were injured about 620 men were employed in this shop. Of these, 365 were carmen and helpers and of these 270 were employed in new car construction. The shop was divided into 2 departments, one doing repair work on equipment in service and the other doing new car construction. Each department was under the supervision of an assistant general foreman. The assistant general foreman in charge of new car building had under him foremen in charge of sections and crews on the assembly line for new car construction. (R47:25ff; 52:15ff; 59:15ff; 210:10ff.) The assembly line consisted of tracks upon which were fixed stations for designated work. The line was so planned that the work at each station would take about 25 minutes. At the end of each such period the whole line moved forward one station. The program called for turning out 18 cars per day. (R53:26ff; 57:24ff; 58:10ff; 212:4ff.)

New car construction was the "number one" program of shop No. 9 (R61:9ff). The work went on without interruption except from January 8, 1951 to February 12, 1951 when there was a shortage of materials (R56:10; 57:11ff). During this period the new construction forces were assigned to other work to keep them intact. On February 13, 1951, new car construction was resumed with 500 automobile cars. These were followed by the 1,000 T & NO gons. Up to the time of trial of *Gileo* these had been followed by 500 boxcars, 500 gons of one type and 400 gons of another type and another program of 1,500 boxcars was in progress. (R57:11ff; 59:15ff; 200:3ff.)

The work on the assembly line was so organized, and men so assigned to it, that if any man was absent from his place on the line the whole line would be stopped until that place was filled (R81:17ff; 213:15). Accordingly, if there were any absences of men on the assembly line their places were temporarily filled by men normally working in the repair department. But men assigned to the assembly line on new car construction were not taken out of it and were not used temporarily for other work.[9] (R58:24-65:16; 212:4-214:11; 215:25-216:5.)

Gileo, Eufrazia and Eelk were all injured while working on the assembly line in new car construction and on the program of construction of the 1,000 T & NO gons.[10] Gileo was injured July 11, 1951 while working on T & NO 47725 (R4:4-8; 5:21-25; 50:21-51:1, 197:14ff; 200). Eufrazia was injured on July 10, 1951 (R1255, 1256). Eelk was injured on June 22, 1951 working on car shop No. 506 [T & NO 47505] (R1438ff, 1447-1457, 1514).

Gileo went to work in the car shop in October, 1941 (R159:14) and worked in various portions of the shop. On February 12, 1951, he "bid in" as a freight carman welder and from that time on did no work except upon new car construction until he was injured. (R180:24ff; 161:7ff; 186:20) He first worked on automobile cars and then, from the time the gon program started in April, 1951, he worked without interruption on the gons (R163:26ff; 186:20ff).

Eufrazia was employed by SP in September 1950 as a helper (R1195);[11] was made an up-graded carman in March

9. If the men were taken off new car construction and put on repair work this was a permanent assignment. So long as a man was assigned to new car construction, however, he did nothing else.

10. See footnote 4 above.

11. All record references in this paragraph are to the record in *Eufrazia v. Southern Pacific Company*.

1951 (R1201) and on June 13, 1951, was assigned to new car construction on the gon program where he worked continuously until the time of his injury (R1255, 1256). After his assignment to new car construction this was the only work he did (1256, 1257, 1316).

Eelk was hired as a carman's helper in shop 9 on November 7, 1950. He worked on old equipment until December 1, 1950, when he was assigned to new car construction. He remained on new car construction, except when it was shut down January 8-February 12, 1951, on account of shortage of material. When new car construction was resumed on February 13, 1951, he went back to that work and remained at it continuously until he was injured. He did no other work. (R1447ff, 1473ff)

B. ARANDA[12]

For 40 or 50 years SP had operated a wheel foundry at Sacramento, California, for the manufacture of cast iron freight car wheels (R1069-1074). The wheels were manufactured solely upon annual order from the SP Store Department (R1081). No wheel was made for any particular car. The wheels went into stock in the Store Department which kept on hand a 40 to 60 day supply. (R1069, 1082) The foundry acquired its own raw materials and supplies (R1076) but had nothing to do with the ultimate assignment and distribution of the wheels for use (R1069, 1070, 1112). In 1950, 67,734 wheels were made and in 1951, 65,216 (R1071, 1072). The wheels were sold and distributed as follows: to car shop 9, for new car construction by SPEC, 9,266 in 1950 and 27,694 in 1951; to Northwestern Pacific Railroad, 926 in 1950 and 724 in 1951; to small users

12. All record references under this head are to the record in *Aranda v. Southern Pacific Company*.

16 in 1950 and 10 in 1951. (R1072) The remainder went to various departments of SP for use as replacements on its own cars and the cars of other railroads (R1073, 1074). In 1950 or 1951 SP also bought freight car wheels from independent manufacturers. (R1076)

Aranda, at the time he was injured on June 12, 1950, had been employed for some 11 years as a molder or molder's helper in the wheel foundry and he was working as such at the time he was injured. (R1091ff)

C. MORENO[13]

SP had 4 freight train yards near Roseville, California. Two were to the east near Roseville and there were 2 others a considerable distance to the west. Between the 2 yards at the east and the 2 at the west there was open country except for 2 main line tracks and 2 drill tracks. (R384-387) SP determined to build a new retarder yard in this open area. The project was a large one.[14] To carry it out the following was involved:

The drill tracks and all main line tracks were removed and a new main line was constructed about one-quarter of a mile to the north. (R379) Eighty additional acres of land were acquired (R389). Two power lines, a gas line, a telephone line and a telegraph line were removed (R397). The site was then graded to a new grade, above that of the old main. (R387, 391). The grading was done by an outside contractor and involved moving 300,000 cubic yards of earth. (R391, 392, 399). SP then went in with its own

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13. All record references under this head are to the record in *Moreno v. Southern Pacific Company*. The record below was gotten up in two parts each having its own page numbering. The first part had to do with the trial of the issue of jurisdiction. The second part had to do with the trial of the issue of negligence and damages. The record references here used are to the first part.

14. The total cost was a little over $1,000,000 (R 398:7).

forces (R399), a force specially organized for this work, and did the remainder of the work. (R376, 405, 406, 410). This called for the following: The installation of 2 main tracks leading eastward to the top of a "hump", installation of the 49 yard tracks to the east which called for 30 miles of track, 98 switches and 12 retarders, the construction of inspection pits at the point of entry to the new yard, the construction of rooms for the doing of necessary clerical work, the construction of 4 control towers, the installation of the air compressors and connections for operating the retarders and the installation of flood lights, new signals and a loud speaker and radio system. (R393-401).

Work on this new project began in April, 1951 (R377, 379). The SP forces went in the latter part of September, 1950 (R399). The new main line was in operation and removal of the old main line began October 1, 1951 (R379, 381, 387). Moreno was employed on October 2, 1951. He worked only upon construction of this new yard. (R416, 419, 426, 428). He was injured in December, 1951 (R421, 423). The first unit of the new yard, 21 tracks, was not opened and put into service until April 1, 1952, something over 3 months after plaintiff's injury (R381, 404).

The retarder yard was new not only as to location and construction but it was new in the manner of operation. The cars being switched and classified, after being shoved eastward up to the top of the hump, then continued by gravity and were handled by power operated switches and retarders, controlled from the control towers, and without the necessity of men riding the cars to control them and without hand throwing of switches in the field. (R377, 389) There is no evidence that any of the 4 old yards was to be abandoned.

II. Proceedings Below and Stage Therein and Manner in Which the Federal Questions Were Raised

A. GILEO

Gileo's complaint was filed in the Superior Court of the State of California in and for the City and County of San Francisco on October 8, 1951 (R3-6.) It was typical of complaints in action to recover damages for injuries under the Federal Employers' Liability Act. It alleged that defendant (petitioner here) at all times was a corporation "engaged in the business of a common carrier by railroad in interstate commerce" (par. I), that "plaintiff was employed by defendant in such interstate commerce, and the accident complained of arose while plaintiff and defendant were engaged" in the conduct of interstate commerce (par. II) and that "this action is brought under and by virtue of the provisions of the Federal Employers Liability Act, 45 U.S.C.A. 51, et seq." (par. III). The remainder of the complaint is taken up with averments of the time and place of the accident, charges of negligence and averments of injury and damage.

By its answer, filed December 4, 1951 (R7-10), petitioner raised the federal questions. The answer admitted defendant's incorporation and that it was, "as a part of its business, engaged in the business of a common carrier by railroad in interstate and intrastate commerce" and was qualified as a self-insurer under the California statutes. (Par. I). It is admitted that plaintiff was employed by defendant in carshop 9 and the time and place of injury are admitted. (R7:21ff.) The remaining averments of the complaint, including those that defendant was a common carrier by railroad in interstate commerce and plaintiff was employed by it in such commerce and that the accident arose while the parties were so engaged, are denied (R8:3-14, par. I).

By notice of motion filed June 24, 1952, agreeably to Cal. CCP § 597 defendant moved "for an order to try separately the issues raised by paragraphs I, II and III of plaintiff's complaint and paragraph I of defendant's answer, namely whether this Court has jurisdiction of this action purportedly maintained under the Federal Employers' Liability Act, 45 USCA § 51, or whether under the Workmen's Compensation Act of the State of California the Industrial Accident Commission has exclusive jurisdiction of the plaintiff's claim:"[15] (R11, 12) On June 27, 1952 this motion was transferred to the presiding judge to be ruled and decided at the time of trial by the trial judge. (R 13).

At the beginning of the trial, and in his opening statement, counsel for the defendant, in outlining the matters to which the evidence would be directed, called to the attention of the jury the general character of the Federal Employers' Liability Act and the California Workmen's Compensation Act (R37-39) and then said:

"Those two statutes are mutually exclusive; if the state of facts is such that the case falls under the State statute and not under the Federal statute, then,

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15. Unless operation of the California Workmen's Compensation Act (Labor Code, Div. IV, § 3201ff) is excluded because the Federal Employers' Liability Act applies, the Workmen's Compensation Act provides the exclusive remedy of an injured employee, the tribunal having exclusive jurisdiction to enforce the remedy is the Industrial Accident Commission and courts are without jurisdiction to entertain an action by the injured employee against his employer. (Labor Code, §§ 3600, 3601, 5300, 5301; *Tipton v. Atchison etc. Co.*, 298 US 141, 80 L.ed 1091; *Scott v. I.A.C.*, 9 C2d 315, 70 P2d 940; *Esquer v. Teresi*, 105 CA 2d 89, 232 P2d 895; *Freire v. Matson Nav. Co.*, 19 C2d 8, 118 P2d 809; *I.A.C. v. Davis*, 259 US 182, 66 L.ed 888; *B. & M. R. Co. v. Armburg*, 285 U.S. 234, 76 L.ed 729; *Gaudet v. S. P. Co.*, 78 F. Supp. 651 (N.D. Cal.) aff'd on opinion below in 174 F2d 1022 (Cire. 9); *Hines v. I.A.C.*, 184 Cal. 1, 192 Pac. 859.) In *Raymond v. Chicago etc Co.*, 243 US 43, 44, 61 L.ed 583, 585 the issue was raised by pleading want of jurisdiction.

in the event of any dispute, the man's remedy is to go to the Industrial Accident Commission. If, on the other hand, the facts are such as to make the Federal statute apply, then his remedy is here.

"Now, the first matter, then, under the instructions his Honor will give you, and under the facts as you will find them, will be this question: Does the Federal Employers' Liability Act apply? Was this railroad, with respect to the work the man was doing, and in respect to his employment, engaged in the kind of activity that brings it under the Federal Act? And was the man, in doing the work he was doing, the type of employee to whom the Federal statute applies? Or, is the Federal statute non-applicable, and isn't this man's proper remedy—as we contend—to apply to the Industrial Accident Commission for an award of compensation, and take his compensation under the State Statute?" (R39)

The remainder of the opening statement, so far as pertinent here, then outlined what the defendant expected the evidence to show with respect to the new car construction program upon which Gileo was working. (R39-43). Testimony was then taken. So far as here pertinent what occurred during the trial can be best summarized by quoting from the judgment filed and entered July 21, 1952 (R19-22).

After reciting that the cause came on for trial the appearances, the impanelment of the jury, the making of opening statements and the introduction of evidence the judgment proceeds:

"By the pleadings and during the course of the trial the issues were raised, presented and tried whether the defendant was a common carrier by railroad engaged in interstate commerce and whether the plaintiff was employed by the defendant as such carrier in such commerce, whether any part of the duties of plaintiff was in furtherance of interstate or foreign commerce or in

any way directly or closely and substantially, affected such commerce, whether the act of the United States of America, in such cases made and provided, and known generally as the Federal Employers' Liability Act (45 USC § 51 ff), applied, whether the Court had jurisdiction of the cause and whether plaintiff's remedy, if any, was under the appropriate provisions of the Labor Code of the State of California and by application to the Industrial Accident Commission of the State of California. These issues were determined by the Court as matter of law as herein appears.

"During the course of the trial, it was stipulated by the parties that the issue of negligence on the part of defendant was conceded and should be resolved in favor of plaintiff, and that if plaintiff were entitled to judgment he was entitled to recover, as to amount, the sum of SEVEN THOUSAND DOLLARS ($7,000.00), that this should bear interest at the rate of 6% per annum from July 8, 1952 should judgment be in plaintiff's favor become final, but that judgment for plaintiff should be without costs in the trial court. There was no stipulation or agreement that plaintiff was entitled to judgment or that the Court had jurisdiction or that the Federal Employers' Liability Act (45 USC §§ 51 ff) applied or that defendant was an employer or plaintiff was an employee under or within the meaning of the Federal Employers' Liability Act (45 USC §51) but said issues were presented, tried, argued and submitted and the Court determined, ruled and ordered, as matter of law, that there was no issue of fact for the jury with respect to these reserved issues, and that resolving all possible conflicts in the evidence in favor of defendant and drawing all possible inferences of fact in favor of defendant, as matter of law defendant, with respect to its activities herein involved and in manufacturing new freight cars, was a common carrier by railroad engaging in interstate commerce and plaintiff was injured while he was employed by defendant and part of his duties as such employee was in further-

ance of interstate and foreign commerce and directly or closely and substantially, affected such commerce, that the Court had jurisdiction of the cause, and that the Court would so instruct the jury. Thereupon it was stipulated by the parties that in the light of and under such ruling of the Court there was no issue of fact to be passed on by the jury and, by consequence the formality of a verdict was unnecessary, the jury might be dismissed and all the reserved issues having been determined by the Court as matter of law, judgment should pass as ordered by the Court and the Court ordered that plaintiff have judgment.

"WHEREFORE, by reason of the law and the premises it is

"ORDERED, ADJUDICATED AND DECREED AS FOLLOWS:

"1. Resolving all conflicts in favor of defendant and drawing all permissible inferences of fact in favor of defendant, as matter of law at the time and on the occasion when plaintiff was injured defendant, with respect to activities on its part connected with said injury, was a common carrier by railroad engaged in interstate commerce and plaintiff at said time and on said occasion was employed by it and as such employee part of his duties was the furtherance of interstate or foreign commerce and directly or closely and substantially affected such commerce, the Federal Employers' Liability Act (45 USC §§.51 ff) applied, there is no issue of fact and there is no matter for submission to a jury or for findings of fact and plaintiff is entitled to judgment as herein rendered.

"2. Plaintiff do have and recover of and from defendant the sum of SEVEN THOUSAND DOLLARS ($7,000.00) damages, with interest at the rate of 6% per annum from July 8, 1952, without costs in the trial court and that execution, unless stayed, issue accordingly.

"Done in open court this 17th day of July, 1952.

/s/ CLARENCE W. MORRIS
JUDGE OF THE SUPERIOR COURT"

From this judgment the defendant appealed to the District Court of Appeal, State of California, First Appellate District (R19-22). It is apparent from the judgment that the only questions there presented were those presented by this petition, for all other matters had been disposed of by stipulation.

On April 28, 1954 the District Court of Appeal rendered its opinion reversing the judgment (R327; App. 5; 124 ACA 951 and 269 P2d 150). Its conclusion was that the FELA did not apply and "that SP was in no different position than a manufacturer, not engaged in railroading, which was manufacturing railroad cars to be delivered to any purchaser." Since the opinion is set out in full in the appendix (p. 5ff) there is no occasion for extensive quotation here and we respectfully refer the Court to the appendix.

Upon application of the respondent Gifeo the Supreme Court of California, on June 23, 1954, granted a hearing and transferred the cause into the Supreme Court for determination (R323). On April 29, 1955 it affirmed the judgment of the trial court. (R325; App. 13; 44 AC 566, 282 P2d 872).

B. MORENO

The complaint in the Moreno case was filed in the Superior Court of the State of California in and for the County of Sacramento on January 9, 1952. (R350-353).[16] The complaint was in three counts. Paragraph I of the First Count contains an averment as to the corporate capacity of defendant Southern Pacific Company and in addition alleges that "said defendant is now, and at all times mentioned herein has been, engaged in the business

16. See footnote 13 above.

of operating a series of railroad trains between several of the states of the United States for the transportation of passengers and freight for hire as a common carrier; that as a part of its said business defendant maintains and operates at the City of Roseville, County of Placer, State of California, certain railroad yards and repair facilities for its trains, and on or about the 19th day of December, 1951, employed plaintiff as a laborer to help keep defendant's said tracks in good repair; that at all times mentioned herein plaintiff was acting within the course and scope of his said employment." The remainder of the first count, paragraphs II, III and IV, consists of averments as to the time and place of the accident, charges of negligence, and averments as to injury and damage. The second count incorporates the first count except paragraph II, the charge of negligence, and adds a different charge of negligence. The third count contains a single paragraph which is simply a charge of negligence. The federal questions were raised by defendant's answer, which was filed on February 29, 1952 (R354-358). The answer admits the incorporation of the defendant, the general nature of its business and that plaintiff was employed by defendant as a laborer, but solely to assist in construction of a new retarder yard near Roseville, California. (R354:8-15) The other averments of the complaint as to plaintiff's employment, and specifically the averment that he was employed to help keep railroad tracks in repair, are denied. (R354:8-15) The absence of jurisdiction of the subject matter of the action is affirmatively pleaded (R355:23-356:2).[17]

The jurisdictional issue raised by defendant's answer was, by consent and agreeably to § 597 of the California Code of Civil Procedure tried separately before the court

17. See footnote 15 above.

without a jury (R623). The jurisdictional issue was tried on June 18, 1952. The evidence and argument at this special proceeding was devoted exclusively to the question of jurisdiction of the Superior Court under the Federal Employers Liability Act as opposed to the jurisdiction of the Industrial Accident Commission of the State of California under the state Workmen's Compensation Act. (R 375-433) On June 23, 1952, the trial court entered its order that "it has jurisdiction in said action." (R625: App. 19).

The case proceeded to trial on the other issues on July 15, 1952. The trial resulted in a verdict for plaintiff. (R359). A motion for judgment notwithstanding the verdict was made and granted. (R360-364) The opinion of the trial court which goes to the question of the negligence of the defendant is set out in full in the appendix. (p. 20, 21) Judgment notwithstanding the verdict was entered on July 22, 1952 (R364; App. 21).

Plaintiff appealed to the District Court of Appeal, State of California, Third Appellate District. (R365). Before a decision by that court, the case was transferred to the Supreme Court of the State of California (R628). The opinion of the Supreme Court of California says that "The first question presented is whether the Federal Employers' Liability Act is applicable". The court, following its decision in *Gileo*, concluded that the FELA applied, that there was evidence from which negligence might be inferred, and reversed the judgment of the trial court. (R617; App. 23)

C. ARANDA

Aranda was commenced by the filing of a complaint in the Superior Court of the State of California, in and for the County of Sacramento, on July 16, 1951. (R633-635) The

plaintiff sought to recover damages under the FELA. The complaint alleged that defendant was "engaged in the business of operating in interstate commerce a series of railroad trains for the hauling of passengers and freight for hire as a common carrier", that in connection with said business defendant maintained and operated in the City of Sacramento "certain railroad yards, shops, repair shops and foundries" and that plaintiff was employed in one of its said foundries. The rest of the complaint consists of averments as to the corporate capacity of the defendant, plaintiff's injuries and damages, and a charge of negligence.

In the amended complaint plaintiff repeated the allegations as to interstate commerce but made three charges of negligence in separate counts (R641-643).

Defendant's answer averred the defendant was engaged in the manufacture of railroad car wheels and other parts of railroad cars as well as in the business of common carrier by railroad in both interstate and intrastate commerce, that as a part of its manufacturing business, defendant maintained a wheel foundry in the City of Sacramento, and that at the time mentioned in the complaint, plaintiff, a molder's helper, was employed "exclusively in the construction of new railroad car wheels, and was not employed in interstate commerce." (R636)

By stipulation of the parties (R104ff ff)[18] the court, sitting without a jury, proceeded under § 597 of the Code of Civil Procedure of the State of California to hear the question of jurisdiction. The matter was set and testi-

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18 As in Moreno (see footnote 13 above) the Reporter's Transcript is in two parts, one for each part of the trial. The record is gotten up in an unusual way. At the opening of the second phase of the trial it was stipulated that the evidence taken on the first phase might be considered (R 6ff) and it appears as an exhibit to the Reporter's Transcript of the second phase.

mony was taken on December 11, 1951. On February 15, 1952, the trial court ordered that it had jurisdiction over the subject matter of the action, and that the Federal Employers' Liability Act was applicable (R1136).

The opinion of the judge who presided at the trial of the issue of jurisdiction, Honorable John Quincy Brown, is set forth in the appendix (pp. 28-33). The question decided is stated as follows:

> "This is a suit brought by the plaintiff against the defendant company, his employer, for damages alleged to have been sustained by plaintiff due to negligence of the defendant. The matter was set for trial before this court, but before proceeding with the jury trial, it was stipulated that the court should first hear and determine the question of whether or not the Federal Employers' Liability Act was applicable. In other words, if this Act is applicable, then the plaintiff may sue in the Superior Court. If, on the contrary, the Federal Act is not applicable, the plaintiff must be governed by the Workman's Compensation Act, and the matter heard before the Industrial Accident Commission of the State of California."[19]

Aranda then proceeded to trial on the other issues on May 7, 8, 9 and 12, 1952. Defendant's motion for a directed verdict upon the ground, among others, that the trial court had no jurisdiction[19] was denied. (R997-998) Plaintiff had a verdict and defendant's motion for judgment notwithstanding the verdict, upon the same grounds as its motion for directed verdict was denied (R652). Defendant appealed to the District Court of Appeal, State of California, Third Appellate District, from a judgment entered on the verdict, and from the order denying its motion for judgment notwithstanding verdict. (R655)

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19. See footnote 15 above.

Before decision in the District Court of Appeal the case was, by order of the California Supreme Court, transferred to that court. (R1139).

On April 29, 1955, the California Supreme Court resolved the jurisdictional question in favor of plaintiff on the authority of *Gileo* and affirmed (R1122 ff; App. 35 ff).

D. EUFRAZIA

Eufrazia's complaint was filed in the Superior Court of the State of California in and for the County of Sacramento on July 3, 1952. It is substantially in the form of the complaint in *Gileo*. It alleges that defendant was a corporation "engaged in the business of common carrier by railroad in interstate commerce in California and other states" (Par. I), that plaintiff "was employed by defendant in such interstate commerce and the injuries herein complained of arose while plaintiff and defendant were so engaged in the conduct of said interstate commerce", that "this action is brought under and by virtue of the provisions of the Federal Employers' Liability Act, 45 USCA § 51, et seq." (Par. II and III) and that plaintiff was injured as a result of defendant's negligence, (R1144-1148)[20]

The answer of defendant admitted generally that it was engaged in the business of a common carrier by railroad in interstate commerce but denied that plaintiff was employed in such interstate commerce and that said injury arose while plaintiff and defendant were engaged in the conduct of interstate commerce; admitted that plaintiff was employed by defendant as a carman in its new freight car manufacturing program being conducted in the defendant's railroad shops in the City of Sacramento and alleged that the Superior Court had no jurisdiction over the subject

20. The complaint is in four counts which differ only in the charges of negligence.

matter of any of the alleged causes of action in the complaint.[21] (R1149-1153)

On October 10, 1952, defendant filed a notice of motion pursuant to the provisions of Section 597 of the California Code of Civil Procedure for an order that the court proceed to the trial of the jurisdictional issue before trial upon the other issues of the cause (R1154). This motion was granted (R1157) and the trial on the special issue of jurisdiction was had on October 30, 1952 (R1190 ff). On December 31, 1952, the court rendered its opinion concluding that the plaintiff must seek his remedy under the California Workmen's Compensation Act and not under the Federal Employers' Liability Act. Findings of fact and conclusions of law were thereupon made pursuant to said opinion and on January 26, 1953, the judgment dismissing the action was made and entered. (R1158-1177; App. 40-54).

On January 28, 1953, plaintiff appealed to the District Court of Appeal, State of California, Third Appellate District. (R1178)

Before decision by the District Court of Appeal, the case was transferred to the Supreme Court of the State of California. (R1352) On April 29, 1955, the State Supreme Court, in a per curiam opinion, decided, upon the basis of its own decision in *Gilco*, that the Federal Employers' Liability Act applied and the judgment of the trial court was reversed. (R1347; App. 54).

E. EELK

The proceedings in *Eelk* were like those in *Eufrazio*. A complaint charging that defendant was at all times "engaged in the business of a common carrier by railroad in interstate commerce in said State of California and other

21. See footnote 15 above.

states" and that "plaintiff was employed by defendant in such interstate commerce, and the accident complained of arose while plaintiff and defendant were engaged in the conduct of interstate commerce" and that the action "is brought under and by virtue of the provisions of the Federal Employers' Liability Act, 45 U.S.C.A. 51 et seq." was filed on July 6, 1951. The complaint is in four counts which are identical except for charges of negligence. (R1356-1361)

By its answer filed on August 15, 1951, defendant admitted the general averment as to its business, but denied the averments of paragraph II of the complaint that plaintiff was employed by defendant in interstate commerce and that the accident arose while plaintiff and defendant were engaged in the conduct of interstate commerce and denied the averments of paragraph III that the action was brought under the Federal Employers' Liability Act and affirmatively alleged the true fact that plaintiff was employed as a carman's helper and was engaged exclusively in working upon new railroad car construction. With the exception of the admissions indicated the averments of the complaint are denied. (R1362-1365)

By consent of the parties the jurisdictional issue was tried to the court, sitting without a jury, on June 12, 1952. (R1366) On February 9, 1953, the court filed its memorandum opinion, concluding that the Federal Act did not apply. (R1366, App. 57) The decision was rested upon the decision of the trial court in *Eufrazia*. Findings of fact and conclusions of law were filed on March 10, 1953, and on these judgment was entered for the defendant. (R1381-1385; App. 70-73).

Plaintiff appealed to the District Court of Appeal, State of California, Third Appellate District. (R1386) Before decision by the District Court of Appeal this case, together with *Moreno, Aranda and Eufrazia* was transferred to the

Supreme Court of the State of California. (R1526). On April 29, 1955, the State Supreme Court filed its per curiam opinion holding that the Federal Employers' Liability Act was applicable, upon the basis of its decision in *Gilco*, and reversed the judgment of the trial court. (R1522; App. 74).

III. Grounds of the Decisions Below

The short of the holdings of the Supreme Court of California was that where an employee of an employer which, as to some of its activities, is a common carrier by railroad in interstate commerce, is injured in the course of his work and claims that the injury resulted from the negligence of his employer the **sole**[22] test of application of the FELA is whether he falls within the extended area of application of the act as to **employees** resulting from the 1939 amendment of § 1 of the act which, re-enacting the first paragraph, added a new and second paragraph. The holdings are that it is immaterial whether the **employer,** as to the activity in question, is acting as a **common carrier** or a **railroad** (the test under the first and unchanged paragraph of § 1) if in a general sense it is a railroad (but *cf. contra Raymond*, p. 34 below), and that the only question is whether any part of the duties of the employee "shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce". The holdings are that the therefore established distinction between new construction (where the act did **not** apply) and repair and maintenance of existing facilities already devoted to common carriage by railroad in the interstate commerce (where the act did apply) has been abolished and that the manufacture of car wheels and new cars, and the construc-

22. Throughout all emphasis by boldface, whether in quoted matter or elsewhere, is ours.

tion of a wholly new yard, "further interstate commerce or affect it * * * 'directly or closely and substantially'," and that this is all that need appear.

The leading opinion of the Supreme Court of California is in *Gileo* followed, without discussion, in *Eufrazia* and *Eelk*. In *Gileo*, after briefly setting out the facts and quoting the statute the court said:

> "It is the position of defendant that it is not liable under the act unless it can be said that in manufacturing railroad cars it was engaged in interstate commerce.[23] This argument overlooks the effect of the second paragraph of the section quoted above, which was added by amendment in 1939. Under that paragraph, plaintiff is considered to have been employed by defendant in interstate commerce and is entitled to the benefits of the act if his duties were in the furtherance of such commerce or affected it in any way 'directly or closely and substantially.' (*Erickson v. Southern Pac. Co.*, 39 Cal.2d 374, 378 [246 P.2d 642])"

The court then said that the 1939 amendment was designed to include employees previously excluded and to eliminate confusion and hardship; that to this end doubt should be resolved in favor of application of the act. A number of cases were then referred to and it was said that the duties of Gileo "were at least as intimately connected with inter-

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23. With deference, the position of the defendant was not and is not so restricted. The defendant rested its position (in part) upon the opening provision of § 1 of the FELA, re-enacted in 1939 without change, which states that the liability being provided for is that of "every **common carrier** by **railroad while** engaging in commerce between any of the several states * * *." The defendant's position was that with respect to the activity in question it must not only be shown that the employer was "engaging in commerce between any of the several states" but also that in respect of such activity it was also a (1) "common carrier", (2) "by railroad".

state commerce" as in the cases cited.[24] The court continued:

> "Before the broad language now appearing in the act was added by the amendment in 1939, some decisions indicated that there was a distinction between an employee repairing equipment already operating in interstate commerce and one constructing equipment later to be used in that commerce, and it was held that the latter did not have federal coverage. (*New York Central R. R. Co. v. White*, 243 U.S. 188, 192 [37 S.Ct. 247, 61 L.Ed. 667]; *Raymond v. Chicago, M. & St. P. R. Co.*, 243 U.S. 43, 45 [37 S.Ct. 268, 61 L.Ed. 583]; see *Pedersen v. Delaware, L. & W. R. Co.*, 229 U.S. 146, 152 [33 S.Ct. 648, 57 L.Ed. 1125].) The only case decided after 1939, however, in which such a distinction was applied is *Moser v. Union Pac. R. Co.*, (1944) 65 Idaho 479 [147 P.2d 836, 153 A.L.R. 341], where a divided court held that an employee working on the construction of four miles of new track was not covered by the act. We cannot agreew ith the reasoning of the majority opinion in the *Moser case*. Under the language added by the amendment, an employee of a common carrier by railroad is entitled to the benefits of the act if his duties further interstate commerce or affect it in any way 'directly or closely and substantially,' regardless of whether the work which he is doing may be classified as new construction or repairs. The cars on which plaintiff was working were intended to be used in interstate commerce, and it is clear that the construction of the cars furthered such commerce."

The opinion in *Aranda* really adds nothing. The procedure of the case is briefly stated and there is a brief statement of the facts. The court then said that "Federal cover-

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24. With deference, none of the cases cited, nor any other case under the FELA, goes nearly as far as the decisions now sought to be reviewed. The cases are more appropriately discussed below.

age has been extended to employees injured while performing duties similar to those involved here" (citing three of the cases cited in *Gileo*, with a brief statement of their facts). The remainder of the opinion on this point is as follows:

> "In the present case, some of the wheels which plaintiff molded were to be used in repairing railroad cars moving in interstate commerce, and the importance of his work to that commerce was not reduced by the fact that the wheels were temporarily stored before being used. We are of the opinion that plaintiff's duties furthered interstate commerce. He is, therefore, considered to have been employed by defendant in interstate commerce and is entitled to the benefits of the act (*Gileo v. Southern Pac. Co., ante*)."

The opinion in *Moreno* after a very brief statement of the proceedings and facts and the reference to two cases (to be dealt with below) disposes of the case on the basis of *Gileo* as follows:

> "In the present case, the construction was new, but the yard was intended as a substitue for the existing method of switching and classifying railroad cars. The proper designation of the work, however, is not important since the applicability of the act depends on whether an employee's duties further interstate commerce or affect it 'in any way directly or closely and substantially.' (*Gileo v. Southern Pac. Co.*, ante; 45 U.S.C.A. § 51.)
>
> "We are of the view that, under the circumstances involved here, plaintiff's duties furthered interstate commerce. He is, therefore, considered to have been employed by defendant in that commerce and is entitled to the benefits of the act. (*Gileo v. Southern Pac. Co.*, ante)."

REASONS FOR ALLOWANCE OF THE WRIT

The Supreme Court of California has decided an important federal question of substance as to the scope and

effect of the 1939 amendment to § 1 of the Federal Employers' Liability Act which has not heretofore been determined by this court, except as a limited phase of the question was incidentally involved in a Longshoremen and Harborworkers' Compensation Act case, presently to be noticed, and the *Desper Case*, below. We have no way of knowing in how many cases in which there are no reported opinions some aspect of the question has been raised. Some aspect of the question has been raised in 82 cases (so far as we are aware) in which there have been published opinions. In one of these cases, under the Jones Act, an opinion was written by this Court (*Desper v. Starved Rock Ferry Co.*, 342 U.S. 187, 96 L Ed 205). In 8 cases the question was whether the Federal Employers' Liability Act or the Longshoremen's Act applied. One of these cases reached this court and the rule established before the 1939 amendment of the Federal Employers' Liability Act was applied (*Penn. R. Co. v. O'Rourke*, 344 U.S. 334, 97 L Ed 367). The other 73 cases involved land-working railroad company employees. None reached this court and this court has never considered the scope or the effect of the 1939 amendment of the Federal Employers' Liability Act although it has, under other statutes, given consideration to the concept of interstate commerce and in this regard dealt with some of its own decisions under the FELA prior to the 1939 amendment. There is no warrant, in any decision of this court, for the length to which the Supreme Court of California has gone.

To the contrary the Supreme Court of California has decided an important federal question of substance in a way probably not in accord with applicable decisions of this court.

In most of the cases before the 1939 amendment the defendant, without question, was acting as a railroad in inter-

state commerce. The only serious question was whether the plaintiff was injured while he was employed by it "in such commerce". This court, nevertheless, had occasion to notice that this was not the sole test; that [under the ordinary rule that all words of the statute are to be taken into account and given effect if that can be done consistently with the plainly disclosed legislative intent" (*McDonald v. Thompson*, 305 U.S. 263, 266, 83 L ed 164, 166; *United States v. Lexington etc. Co.*, 232 U.S. 399, 410, 58 L ed 658, 662)] the opening words of § 1 could not be ignored and that the descripiton of the person upon whom liability was imposed by these words i.e., "every common carrier by railroad while engaging in commerce between any of the several states * * *", imported a **second** test which must be met before the statute could be applied. This language imports into the statute its own test for application of the statute because of the established proposition, ignored by the Supreme Court of California, that the mere fact that an employer is a common carrier by railroad in interstate commerce as to some of its activities does not give it that character as to all of its activities. (*Raymond*, p. 34 below.) There can be carriage by railroad without **common** carriage (*McCluskey v. Marysville & N. Ry. Co.*, 243 U.S. 36, 61 L ed 578 and *Bay v. Merrill etc. Co.*, 243 U.S. 40, 61 L ed 580, holding that the FELA did not apply); a railroad can be both a common carrier and a private carrier (*Santa Fe etc. Co. v. Grant Bros. Const. Co.*, 228 U.S. 177, 57 L ed 787; *Chenery v. Employers' Liab. Assur. Corp.*, 4 F2d 826 (Circ. 9)). These are the considerations which dictated the holdings that the FELA did not apply to a railroad company when it was a common carrier by **water** and **not by rail** (*So. Pac. Co. v. Jensen*, 244 U.S. 205, 213, 61 L ed 1086, 1097) or by elevator (*So. Ry. Co. v. Taylor*, 16 F2d 517 (Circ. Dist. Col.—cert. den. 273 U.S. 767, 71 L ed 882)).

The proposition that before the act can apply the test imposed by the opening language that the **employer**, with respect to the activity in question, must be acting as (1) a "common carrier", (2) "by railroad", (3) in interstate commerce was recognized by the first decision of this court dealing with application of the act and, until now, has never been questioned. In *Pedersen v. Delaware etc. R. Co.*, 229 U.S. 146, 57 L ed 1125, holding that the act applied to the repair and maintenance of instrumentalities devoted to and used in common carriage by railroad in interstate commerce and expressly distinguishing the cases of "construction of tracks, bridges, engines, or cars which have not as yet become instrumentalities in such commerce", the court said:

> "Considering the terms of the statute, there can be no doubt that a right of recovery thereunder arises only where the injury is suffered while the **carrier**[25] is engaged in interstate commerce, and * * *. The true test of this is: Is the work in question a part of the interstate commerce in which the **carrier** is engaged?"

St. Louis, etc. Co. v. Seale, 229 U.S. 156, 158, 57 L ed 1129, 1133 said application of the act "turns upon whether the injuries which caused the death of the deceased were sustained **while the company was engaged**, and while he was employed by it, in interstate commerce." *Shanks v. Delaware etc. R. Co.*, 239 U.S. 556, 557, 60 L ed 436, 438, which evolved a definitive test for application of the act as it read before the 1939 amendment had this to say:

> "Thus it is essential to a right of recovery under the act not only that the **carrier** be engaged in interstate commerce at the time of the injury, but also that the person suffering the injury be then employed by the **carrier** in such commerce. And so it results where the carrier is also engaged in **intrastate commerce, or in**

25. All emphasis by boldface type is ours.

what is not commerce at all,[26] that one, while employed therein by the carrier, suffers injury through its negligence, or that of some of its officers, agents, or employees, **must look for redress to the laws of the state** wherein the injury occurs * * *."

Delaware etc. R. Co. v. Yurkonis, 238 U.S. 439, 445, 59 L ed 1397, 1400, held that the act did not apply where an employer, a common carrier by railroad in interstate commerce as to some of its activities, was engaged in mining its own coal. "The injury happened when plaintiff was preparing to mine coal and was not an injury happening in interstate commerce, and **the defendant was not then carrying on interstate commerce**—facts essential to recovery under the employers' liability act."

It would be profitless to review all the cases. In most there was no question as to the activity of the employer,—concededly it was common carriage by railroad in interstate commerce,—and the question discussed was the employment of the injured man. The cases dealing with new construction, however, deserve notice. *Raymond v. Chicago etc. Ry. Co.*, 243 U.S. 43, 61 L ed 583 held that the act did not apply to the construction of a new tunnel designed to shorten the main line of a railroad. "Raymond **and the railway company** were not engaged in interstate commerce." The result was reached "even although it be conceded that the railroad company was, in a general sense, engaged in interstate commerce". It was noticed that on the same day in *New York C. R. Co. v. White*, 243 U.S. 188, 61 L ed 667, where the same result had been reached as to a watchman of materials to be used in construction of a new station and track, the court held that "the admitted fact that the new station and tracks were designed for use, when finished, in interstate commerce, does not bring the case within the Federal Act." The work

26. As to what, for a **railroad**, is "commerce" see p. 41 below.

"bore no direct relation to interstate transportation, but had to do solely with construction work, which is clearly distinguishable" (citing the *Pedersen Case*, above). The same rule had theretofore been applied to the installation of a new station outhouse in a memorandum opinion in *Minn. etc. R. Co. v. Nash*, 242 U.S. 617, 61 L ed 531 reversing 131 Minn. 166 and 495, 154 NW 957 and 155 NW 1102.

Until the decisions below there was no hint or suggestion that the considerations just noticed have been changed or affected by the 1939 amendment of § 1 of the FELA. To the contrary everything, the decisions of this court included, points the other way.

There is no suggestion in the legislative history of the amendment that it was designed to enlarge the scope of application of the statute so far as the employer's activity was concerned. To the contrary the Senate Report to accompany the bill, S. 1708, in speaking of the enlargement of the area of the application of the statute stated simply that "it broadens and clarifies the law in its application to employees"; that it was designed to broaden the act to bring within it "employees of common carriers who, while ordinarily engaged in transportation of interstate commerce may be, at the time of injury, temporarily divorced therefrom and engaged in intrastate operations." It further pointed out that the design was to cover employees "who are constantly shifting from one class of service to another" to provide uniform treatment. In dealing with employees it specified only two classes, (1) those "moving or working on cars or engines which had been temporarily withdrawn from interstate commerce" and (2) those "in railroad switching service" who are engaged in interstate or intrastate commerce several times during a single tour of duty.

The form of the amendment is itself significant. Section 1

as it read prior to the act was not changed. Nothing new is said of employers. There is no new definition of interstate commerce. To the contrary the whole of § 1 was re-enacted (without change and hence with the settled construction given to it). The amendment was only by adding a new and second paragraph dealing only with the definition of employees. The significance of this form of amendment has been noticed (see *Holl v. So. Pac. Co.*, 71 Fed. Supp. 21 (N.D. Cal.); *Ernhart v. Elgin etc. Co.*, 337 Ill. App. 56, 84 NE2d 868, 871).

To the limited extent to which this court has had occasion to consider the matter its holdings support what has just been said and are out of harmony with the decisions below. *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187, 96 L ed 205, was an action under the Jones Act (46 USC § 688 which makes the FELA applicable to seamen) for damages for injuries received by one while working on a vessel on dry land in preparing it for the coming season and who, when the vessel was launched, was to be employed as a member of the crew. The plaintiff (petitioner) contended that the 1939 amendment of the FELA so enlarged its scope that the suit could be maintained under the Jones Act. This is the significant language of the opinion, so far as we are concerned with it:

> "We agree with the court below that the Amendment has no effect on the 'right or remedy' of railway employees **but merely redefines for the purposes of the Federal Employers' Liability Act the scope of the word 'employee'** to include certain persons not theretofore covered, because they were not directly engaged in interstate or foreign commerce."

Penn. R. Co. v. O'Rourke, 344 U.S. 334, 97 L ed 367, was an action by an injured railroad brakeman whose duties gen-

erally were in switching railroad freight cars in a railroad yard. He was injured while releasing hand brakes on freight cars that were on a car float, so that they might be pulled off the float. He sued under the FELA. The trial court held the Act did not apply and that the Longshoremen's Act (33 USC § 901ff) applied exclusively (99 Fed. Sup. 506). The Court of Appeals reversed on the ground plaintiff was doing railroad work and his employment was non-maritime (194 F2d.602,—Circ. 2). This court reversed, holding that the employment was "maritime" not from the nature of the employee's work **but because of the status of the employer**. The court said:

> "We are clear, however, that **emphasis on the nature of respondent's duties here misses the mark**. The statute [Harbor Workers' Act] applies, by its own terms, to accidents on navigable waters when the **employer** has employees engaged in maritime service. * * * Besides § 902(4) is directed at the **employer** when it speaks of maritime employment, not at the work the employee is doing. The exclusive coverage of §§ 903, 905 extends to an employee of an employer, made liable by § 904, when he is injured, in the course of his employment, on navigable water. The Court of Appeals, we think, is in error in holding that the statute requires, as to the employee, both injury on navigable water and maritime employment as a ground for covering by the Compensation Act. * * * If, then, the accident occurs on navigable waters, the Act must apply if the injured longshoreman was there in furtherance of his **employer's** business, irrespective of whether he himself can be labeled 'maritime'."

In the cases here under review, under the authorities just noticed, the nature of the employees' activities and their relation to interstate commerce do not provide the sole test. The nature of the activity of the employer must be looked to. In none of the cases does the activity of the employer

live up to the requirements of the statute. The employer was not acting as a common carrier. It was not even acting as a carrier, much less a common carrier. The activities of the employer were not "by railroad",—the employer was engaged in the manufacture new freight car wheels and new freight cars (for use by another railroad), and in the construction of a new retarder yard.

This is sufficient for these cases without the further inquiry whether the employee was engaged in interstate commerce. Until June 6, 1955 this inquiry could, as readily, have been answered against the suggestion that the employer was so engaged on the authority of the *Raymond Case* and like cases above at p. 34. But this matter now poses an important and unresolved problem under the **Federal Employers' Liability Act** because of the decision on June 6, 1955 in *Mitchell v. Vollmer & Co.*, ... U.S. ...., 99 L ed (Adv. Op. 734, Oct. Term, 1954, No. 387).

Mitchell was an action under the Fair Labor Standards Act (29 USC § 201ff) and the question was of application of that act. Petitioner was working on a new unit of the Gulf Intracoastal Waterways, a new unit designed to furnish better passage into and across the Mississippi than that provided by the present Harvey Lock and Canal. It was held that the petitioner was engaged in interstate commerce within the meaning of the Fair Labor Standards Act. It was argued, and the lower courts had held, that the new lock was in the same category as the new tunnel in *Raymond v. Chicago etc. R. Co.*, 243 U.S. 43, 61 L ed 583, p. 34 above. This court was thus invited to follow *Raymond* or to overrule it. It did neither, but distinguished it. Upon a construction of the facts it was said that the work "is part of the redesigning of an existing facility of interstate commerce". Of *Raymond* it was said: "We do not think that case should

control this one. **We are dealing with a different act** of another vintage—one that has been given a liberal construction * * *." This is very far from disapproval of *Raymond* as a construction of the FELA and is very far from any intimation that in cases under the FELA the established construction of that Act will be departed from or should be departed from after re-enactment, without change,[27] in 1939 of the language with which we are here concerned by a Congress which we know was well aware of the settled construction which had been given to the act (see *Overstreet v. North Shore Corp.*, 318 U.S. 125, 131, 87 L ed 656, 662).

Rule 19 does not state as a consideration governing the granting of certiorari conflict between State courts in the decision of federal questions. But where, as under the Federal Employers' Liability Act, the ultimate determination of questions under the act has been left largely to the state appellate courts[28] we suggest that it is a matter for consideration that the decisions below are in square conflict with the decision of the Supreme Court of Idaho in *Moser v. U.P.R. Co.*, 65 Ida. 479, 147 P2d 336, a conflict made explicit by the language in *Gileo*,—"we cannot agree with the reasoning of the majority opinion in the *Moser Case*"—and by the

27. The cases are collected in Appendix B, "Opinions During the Past Decade Resting upon the Rule that the Reenactment of a Statute Carries Gloss of Construction Placed upon it by this Court", to the opinion of Mr. Justice Frankfurter in *Com'r v. Church*, 335 U.S. 632, 690, 93 L ed. 288, 323.

28. Under the FELA the jurisdiction of courts of the United States "shall be concurrent with that of the courts of the several states" (45 USC § 56) and "a civil action in any state court against a railroad" under 45 USC §§ 51-60 "may not be removed to any district court of the United States" (28 USC § 1445(a)) so that in the event of conflict between courts of the states relief from the conflict can be looked for by the railroads only in this court if the state courts persist in their holdings.

divergent holdings in *Moser* and *Moreno* both of which were cases of construction of new yards. *Moreno* is a much stronger case for non-application of the act because the project there was of much greater size, was not an alteration of existing facilities, was new in location and character and could not be classified as a mere adjunct to or improvement of existing facilities.

Passing from the activity of the employer to that of the employee, unless *Mitchell v. Vollmer & Co.*; p. 38 above, is to be controlling in cases under the FELA and *Raymond*, p. 34 above, and the cases which follow it are to be over-ruled,—and while *Mitchell* may cover *Moreno* it falls short of *Gileo, Eufrazia, Eelk and Aranda*,—the decisions below extend the area of application of the FELA far beyond that of any earlier case.

One basic proposition seems tolerably clear,—the 1939 amendment was not intended to sweep under the Act all employees of an employer which is a common carrier by railroad in interstate commerce. Had Congress intended this result and intended to risk the serious constitutional question it would have been a simple matter for it to say so and re-write § 1 of the Act in the language which led to the holding of the Act of 1906 (34 Stat. 232, c. 3073) unconstitutional (*Howard v. Ill. C. R. Co. and Brooks v. So. Pac. Co.*, 207 U.S. 463, 52 L ed 297). This was not done. The new and enlarged definition of "employee" was limited and circumscribed. As originally introduced the proposed amendment would have applied the Act to employees any part of whose duty was the furtherance of interstate commerce or "in any way" affected interstate commerce. In the course of enactment there was substituted for the words "in any way" the present and more restricted language "in any way **directly or closely and substantially**" affect interstate commerce.

(*Ermin v. Penn. R. Co.*, 36 F Supp 936, 938 (E. D. N. Y.); *Moser v. U. P. R. Co.*, 65 Ida. 479, 147 P2d 336, 343). This deliberate change must, in construing the statute, be given proper weight (*United States v. St. Paul, etc. Co.*, 247 U.S. 310, 318, 62 L ed 1130, 1134; *Fox v. Standard Oil Co.*, 294 U.S. 87, 96, 79 L ed 780, 787; *Helvering v. Wood*, 309 U.S. 344, 348, 84 L ed 796, 798; *Western U. T. Co. v. Lenroot*, 323 U.S. 490, 509, 89 L ed 414, 427).

In the business of a railroad the activities are not so self-classifying that the term "commerce" can be directly applied without more. This has been pointed out repeatedly. The business of railroads is transportation and, as to them, interstate commerce is interstate transportation. All persons attached to a railroad in some measure lend to the furtherance of its business. But this court had established that for them to be engaged in interstate commerce something more is called for and the test, first fully worked out in the *Shanks Case*, and later more fully explained, is whether the employee is "engaged in interstate **transportation** or in work so closely related to it as to be practically a part of it" (*Shanks v. Delaware etc. R. Co.*, 239 U.S. 556, 60 L ed 436; *I.A.C. v. Davis*, 259 U.S. 182, 66 L ed 888; *Chicago etc. Ry. Co. v. Bolle*, 284 U.S. 74, 76 L ed 173; *Chicago etc. R. Co. v. Ind. Com'n* 284 U.S. 296, 76 L ed 304; *New York etc. R. Co. v. Bezue*, 284 U.S. 415, 76 L ed 370). To be sure, under the 1939 amendment, this test no longer applies and the area of the application of the act has been enlarged. But it has been enlarged only to include those employees some part of whose duty is "the furtherance of interstate or foreign commerce; or shall, in some way directly or closely and substantially, affect such commerce" i.e. to employees whose duties are the furtherance of interstate **transportation** or work so closely connected to it as to be practically part of it, or directly or

closely and substantially affects such transportation or work that is practically a part of it.

Only in the most figurative sense could it be said that the work of any of the men here involved furthered interstate transportation or "directly or closely and substantially" affected it. The decisions below go beyond any of the cases. This is no place to review all of them. It is enough to say that the court below selected what it considered the strongest it could find (in the briefs below all of the cases were presented to the court and were reviewed) and none goes far enough to support the results below.

First as to the cases cited in *Gileo: Shelton*,[29] *S. P. Co. v. I. A. C.*[30] and *Trucco*[31] were cases of work in a railroad repair shop in connection with the repair of running equipment which had been dedicated to interstate commerce. *Brainard*[32] and *Ericksen*[33] involved assembly and inspection of equipment which was to be sent out immediately for installation in main line tracks. *Wills*[34] and *Jordan*[35] involved work on appurtenances to fixed structures dedicated to the general business of a railroad and, hence, to interstate commerce. *Agostino*[36] was the construction of new track which was to be only an improvement of a short section of existing main line and, whether rightly or wrongly, the case was put upon

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29. *Shelton v. Thomson*, 148 F2d 1 (Circ. 7).

30. *So. Pac. Co. v. Ind. Acc. Com'n*, 19 C2d 283, 120 P2d 888.

31. *Trucco v. Erie R. Co.*, 353 Pa. 320, 45 A2d 20.

32. *Brainard v. Atchison etc. Ry. Co.*, 87 F. Supp. 921 (D.C. Kan.).

33. *Ericksen v. So. Pac. Co.*, 39 C2d 374, 246 P2d 642.

34. *Wills v. Terminal R Ass'n of St. Louis*, 239 Mo. App. 1144, 205 SW 2d 942.

35. *Jordan v. Baltimore & O. R. Co.*, 135 W. Va. 183, 62 SE 2d 806.

36. *Agostino v. Penn. R. Co.*, 50 F. Supp. 726 (E.D. N.Y.).

the ground that this was maintenance of the main line and not new construction. No additional cases were cited in the other opinions. So far as we are aware every case in which there was a published opinion was called to the attention of the court below with the exception of *Straub v. Reading Co.*, 220 F2d 177 (Circ. 3) not decided until March 10, 1955. It held that the Act applied to an assistant chief time-keeper who had supervising duties which included seeing that men operating trains were properly paid and that the Hours of Service Act was not violated,—he was no mere clerk as in the *Holl Case*, p. 36 supra,—but even so the court characterized the case as "definitely a border-line case."

We believe that the matter need not be, and should not be, enlarged upon in view of the recent decision of this court in *Mitchell*, p. 38 above and upon this phase the case, in the light of *Mitchell*, can be put in these terms: Is this court now ready to overrule *Raymond v. Chicago etc. Ry. Co.*, 243 U.S. 43, 61 L ed 583 and to agree with the court below that the established distinction between maintenance and repair upon the one hand and manufacture of new construction upon the other is to be obliterated by judicial action and is this court now to remove its Congressionally approved gloss to the first paragraph of § 1 of the Act with which that paragraph was reenacted in 1939 without legislative suggestion of change except as to the definition of "employee"?

It is respectfully submitted that the questions presented are ripe for determination by this court, should be determined by this court and that the writ of this court should issue to review the decisions below.

Respectfully submitted,

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Southern Pacific Company

APPENDIX

Gileo vs. Southern Pacific Company

Trial court and cause entitlement:

In the Superior Court of the State of California, in and for the City and County of San Francisco

No. 411036

CHARLES M. GILEO,
Plaintiff,
v.
SOUTHERN PACIFIC COMPANY, a corporation,
Defendant.

Judgment, trial court:

(Title of court and cause omitted.)

JUDGMENT

The above entitled cause came on duly and regularly for trial before the above entitled Court, Department No. 18 thereof, Honorable Clarence W. Morris, a judge of said Court, presiding, the Court sitting with a jury, on Monday, July 7, 1952 on the issues made by plaintiff's complaint and defendant's answer and the cause was thereupon tried and determined. Upon said trial plaintiff appeared in person and by his attorneys Messrs. Hildebrand, Bills & McLeod, Clifton Hildebrand, Esq., and Sheridan Downey, Esq., Jr.,

and defendant appeared by its attorneys Messrs. Dunne, Dunne & Phelps and Arthur B. Dunne, Esq. A jury was impaneled and sworn to try the cause, opening statements on behalf of the parties were made by their respective counsel, evidence, both oral and documentary, was introduced and the cause was then submitted for decision as herein appears.

By the pleadings and during the course of the trial the issues were raised, presented and tried whether the defendant was a common carrier by railroad engaged in interstate commerce and whether the plaintiff was employed by the defendant as such carrier in such commerce, whether any part of the duties of plaintiff was in furtherance of interstate or foreign commerce or in any way directly or closely and substantially, affected such commerce, whether the act of the United States of America, in such cases made and provided, and known generally as the Federal Employers' Liability Act (45 USC § 51 ff), applied, whether the Court had jurisdiction of the cause and whether plaintiff's remedy, if any, was under the appropriate provisions of the Labor Code of the State of California and by application to the Industrial Accident Commission of the State of California. These issues were determined by the Court as matter of law as herein appears.

During the course of the trial, it was stipulated by the parties that the issue of negligence on the part of defendant was conceded and should be resolved in favor of plaintiff, and that if plaintiff were entitled to judgment he was entitled to recover, as to amount, the sum of SEVEN THOUSAND DOLLARS ($7,000.00), that this should bear interest at the rate of 6% per annum from July 8, 1952 should judgment be in plaintiff's favor become final, but that judgment for plaintiff should be without costs in the trial court. There

was no stipulation or agreement that plaintiff was entitled to judgment or that the Court had jurisdiction or that the Federal Employers' Liability Act (45 USC § 51 ff.) applied or that defendant was an employer or plaintiff was an employee under or within the meaning of the Federal Employers' Liability Act (45 USC § 51) but said issues were presented, tried, argued and submitted and the Court determined, ruled and ordered, as matter of law, that there was no issue of fact for the jury with respect to these reserved issues, and that resolving all possible conflicts in the evidence in favor of defendant and drawing all possible inferences of fact in favor of defendant, as matter of law defendant, with respect to its activities herein involved and in manufacturing new freight cars, was a common carrier by railroad engaging in interstate commerce and plaintiff was injured while he was employed by defendant and part of his duties as such employee was in furtherance of interstate and foreign commerce and directly or closely and substantially, affected such commerce, that the Court had jurisdiction of the cause, and that the Court would so instruct the jury. Thereupon it was stipulated by the parties that in the light of and under such ruling of the Court there was no issue of fact to be passed on by the jury and, by consequence the formality of a verdict was unnecessary, the jury might be dismissed and all the reserved issues having been determined by the Court as matter of law, judgment should pass as ordered by the Court and the Court ordered that plaintiff have judgment.

WHEREFORE, by reason of the law and the premises it is ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Resolving all conflicts in favor of defendant and drawing all permissible inferences of fact in favor of defendant, as matter of law at the time and on the occasion when plain-

tiff was injured defendant, with respect to activities on its part connected with said injury, was a common carrier by railroad engaged in interstate commerce and plaintiff at said time and on said occasion was employed by it and as such employee part of his duties was the furtherance of interstate or foreign commerce and directly or closely and substantially affected such commerce, the Federal Employers' Liability Act (45 USC § 51 ff) applied, there is no issue of fact and there is no matter for submission to a jury or for findings of fact and plaintiff is entitled to judgment as herein rendered.

2. Plaintiff do have and recover of and from defendant the sum of SEVEN THOUSAND DOLLARS ($7,000.00) damages, with interest at the rate of 6% per annum from July 8, 1952, without costs in the trial court and that execution, unless stayed, issue accordingly.

Done in open court this 17th day of July, 1952.

CLARENCE W. MORRIS
Judge of the Superior Court

(File and recording endorsements omitted.)

Opinions and judgment on appeal:

In the District Court of Appeal of the State of California.
First Appellate District, Division Two.

Civil No. 15612

CHARLES M. GILEO,
Plaintiff and Respondent,
vs.
SOUTHERN PACIFIC COMPANY,
a corporation,
Defendant and Appellant.

This is an appeal from a judgment of $7000 awarded to plaintiff Gileo for injuries suffered while working as a carman welder for defendant railroad. Plaintiff's action was based on Federal Employers' Liability Act (45 USC § 51).

Southern Pacific (SP) following World War II undertook a program of acquiring new equipment. Some of the equipment was to go to an SP subsidiary, the Texas & New Orleans Railroad Company (T & NO). In August of 1950 the Board of Directors of SP adopted a resolution to acquire 5000 units of freight train equipment. Some of the equipment was assigned to SP and some to T & NO. Included in the assignment to the latter were 1000 gondola freight cars (gons). The gons were to be built in the SP shops at Sacramento. The Southern Pacific Equipment Company (SPEC) determined to build 2000 of the units including the 1000 gons assigned to T & NO. The SPEC purchased the necessary materials and entered into a contract with SP under which SP agreed to supply the shop facilities and labor. The

labor force worked for SP. SP paid them and billed SPEC for such labor costs.

The SPEC contracted with George Smith and H. J. Wylie, purchasers, to construct, sell and deliver the cars to them. The purchasers then assigned the contract to the Pennsylvania Company for Banking and Trusts pursuant to an agreement made by Smith and Wylie with the Pennsylvania Banking Company and the SP. The Bank was trustee of the Southern Pacific Company Equipment Trust. The SPEC billed the Bank and transferred title to it as trustee.

The Bank then leased the equipment to the SP or to T & NO, as the case might be.

At Sacramento SP has general shops separate from the operating or transportation division. One of these general shops was car shop No. 9, and the new cars were to be constructed there.

Construction began on July 1, 1950. The car shop was divided into two departments, one doing repair work and the other doing new car construction.

The new car construction was done in assembly line fashion on two tracks. The work was interrupted only two days by inclement weather and once due to shortage of materials for approximately one month from the time the work began to the time of trial. During the period when there was a shortage of materials for new construction the construction crews were assigned to repair work in order to keep the force intact. This was before Gileo was assigned to new car construction.

All the men working for SP were on one seniority list and there was no bidding done for an individual job as such. If a man bid for a job in shop No. 9, he would be assigned to a particular job by the supervising staff.

Because of the importance of new car construction, a man assigned to this work was assigned on a continuous basis. However the number of men working on construction varied with the type of car being built. For example 425 men worked on the constguction of automobile cars, but only 270 men worked on gons. There was approximately a 10% absenteeism rate and in order to keep the assembly line moving these vacancies were temporarily filled with men working in the repair department. But the men assigned to new construction were not moved temporarily to other jobs in case of short breakdowns and if assigned to other departments were done so on a permanent basis.

Gileo first went to work for SP in the car shop at Sacramento in October 1941. He worked as a helper and apprentice learning the business and became a journeyman carman in April 1946. He also became qualified as a welder.

In February 1951 Gileo bid in for a job as welder in car shop No. 9. He worked on new automobile cars and after that worked on new gondola cars up until the time he was hurt on July 11, 1951. Gileo returned to work on the second day after the accident and again worked on gons, until he bid in as an inspector in the car machine shop. Later as a result of the injury he began having recurrent headaches which forced him to leave work from time to time.

Gileo began working on the construction of new gons in April 1951 and from that time until he was hurt he was never assigned any repair work. From February to July he remembers a couple of times in which he did repair work. This work consisted of repairing a machine that had broken down and this machine was used in the construction of new cars.

It was stipulated by both parties that the issue of negligence be decided in favor of plaintiff, that if given judg-

ment he recover $7000 in damages, that the court discharge the jury and rule as a mater of law whether or not the Federal Employers' Liability Act (FELA) applies in this fact situation. The court ruled that as a matter of law at the time plaintiff was injured defendant with respect to its activities connected with the injury was a common carrier engaged in interstate commerce and that the plaintiff's duties as employee included the furtherance of interstate commerce and directly and substantially affected such commerce. It therefore held that FELA is applicable as a matter of law.

The sole contention of appellant is that FELA is not applicable in this fact situation and therefore the trial court had no jurisdiction.

FELA was first passed in 1906 but was declared unconstitutional by the Supreme Court because it gave Congress the power to regulate subjects outside of its scope of authority. In 1908 the Act was made more restrictive in its application to interstate commerce and therefore its constitutionality was sustained. In 1939 the Act was amended because under the case decisions it was necessary that the employee be engaged in interstate commerce at the very moment of injury to fall under the Act. This brought about harsh results in many cases. Therefore the amendment provided that employees "any part of whose *duties as such employee* shall be the furtherance of interstate . . . commerce; or shall in any way *directly* or *closely* and *substantially affect such commerce* . . . shall . . . be considered as entitled to the benefits of this chapter." (Emphasis ours.)

The only change made by the 1939 amendment was to give a new definition to the term "employee". In 10 A.L.R. 2d 1279 beginning at page 1281 a quotation from the Senate Judiciary Committee's deliberations on this amendment is

made. This quotation recognizes that the difficult question of fact presented in many cases of whether or not at the moment of injury the injured person was engaged in interstate commerce resulted in unfair consequences because of needless expensive litigation and statute of limitations barriers if the plaintiff chose the wrong remedy. Consequently by this amendment Congress wished to abolish the requirement that the employee must be actually engaged in interstate traffic at the moment of injury. However the change from the "moment of injury" test to the "duties as such employee" test still leaves a twilight zone in which the courts must make difficult fact decisions. Both parties agree that the only case squarely considering the question whether an employee of a railroad engaged exclusively in new construction is covered by the FELA is Moser v. Union Pacific Railroad Co., 147 P.2d 336. In that case the Idaho Supreme Court held that a member of a construction crew engaged in the construction of new tracks and switches and a large icing dock was not covered by the FELA. This decision was by a closely divided court.

We need not decide whether this case was correctly decided on its facts, because in our case SP was not engaged in directly manufacturing new cars for its own use. It was manufacturing the cars under contract with a separate corporation and after their manufacture title was transferred to another corporation which in turn leased the cars to SP or, in the case of the gons on which Gileo was working for a considerable period before his injury, to T & NO, a different railroad company. Under the facts of this case we are satisfied that SP was in no different position than a manufacturer, not engaged in railroading, which was manufacturing railroad cars to be delivered to any purchaser.

The more difficult question arises from the facts that Gileo was employed generally in the carshop and that he could at any time have been assigned to the repair work being done in the carshop, as evidenced by the fact that before he entered the carshop the crew engaged in new car construction was in fact transferred to repair work in the shop during the period when there was a shortage of material for new car construction. From these facts can it be said that a "part" of Gileo's "duties" "directly or closely and substantially" affected interstate commerce?

The question is pointed up by three decisions which seem most closely in point. In Wright v. New York Cent. R. Co., 33 N.Y.S. 2d 531, quoting from the opinion: "Claimant usually worked in intrastate commerce for five days a week and in interstate commerce for one day a week . . . when injured, he was engaged in intrastate commerce." The court held that since a part of the claimant's duties were in interstate commerce he was covered by the FELA even though on the day of his injury he was engaged exclusively in intrastate commerce. This case was affirmed by the Court of Appeals (43 N.E. 2d 97) and the U. S. Supreme Court denied certiorari (317 U.S. 668).

In Scarborough v. Pennsylvania R. Co., 35 Atl. 2d 603, a railroad signalman whose duties were generally in interstate commerce had for three weeks been engaged in installing new station lights when he was injured. The court held that even if this installation work did not fall under the definition of the FELA, i.e., if at the time of injury his work was exclusively intrastate, a part of his duties were in interstate commerce. The court said (p. 606): "Taking into consideration that Scarborough's general duties were in interstate commerce, and that he was subject to call at all times for such service . . . he continued to be employed as a

signalman. . . . He was subject to call to do temporary work, such as he was doing when injured, but the fact remains that he was always available to perform his general duties, which were in the furtherance of interstate commerce."

In Robinson v. Pennsylvania R. Co., 113 F. Supp. 863 a railroad carpenter was a member of a bridge repair crew which at times worked on railroad bridges and at times on highway bridges which crossed the railroad tracks. For almost 2 months before his injury he had been engaged exclusively in repairing a highway bridge. The court assumed that this work was exclusively intrastate, but none the less held that a part of the claimant's duties were in interstate commerce, saying (p. 865):

"Perhaps there may be situations where a railroad employee, whose work includes duties of both an interstate and intrastate nature, is engaged in work of an intrastate nature for so long a period that he will lose the coverage of the Act, but the present case, in my opinion, does not involve one of these situations."

These three cases have broadly construed the FELA to include within its scope employees who for a considerable period of time (5 days, 3 weeks, nearly 2 months) have been employed exclusively in intrastate commerce, where the general scope of duties performed by them over a longer period has included and would continue to include interstate employment.

The line must still be drawn somewhere. By adopting the "any part of whose duties" test the Congress has abolished the "moment of injury" test, but it has still left open the question under what circumstances may it be said that any part of an employee's duties closely affect interstate commerce.

In each of the three cases above discussed the employee was not only subject to assignment to interstate duties, but had previously been engaged in interstate duties in the very employment and presumably would soon be engaged in interstate duties again. In the case before us, under the practice adopted by SP, Gileo from the moment he entered the carshop on February 12, 1951, and was assigned to new car construction until the time of his injury 6 months later was employed exclusively in new car construction. He could have been assigned to repair work but in practice he was not, and would not be, so long as the new car construction continued and the materials for new car construction were available. The bare possibility of future assignment to repair work standing alone, does not seem to us sufficient to make "any part of his duties" affect interstate commerce within the meaning of the FELA. The test must be a practical, not a purely theoretical one. No case has gone so far as to hold that an employee whose immediate work over a long period of time has been exclusively in intrastate commerce, and no part of whose work in the past in that particular employment has been in interstate commerce, is covered by the FELA because of the possibility only that he might have been assigned to interstate employment at any time. We are satisfied under the facts of this particular case that respondent was not covered by the FELA.

Judgment reversed.

DOOLING, J.

We concur:
NOURSE, P. J.
KAUFMAN, J.

(File endorsement omitted.)

In the Supreme Court of the State of California In Bank

S. F. 19090

CHARLES M. GILEO,
Plaintiff and Respondent,
v.
SOUTHERN PACIFIC COMPANY, a Corporation,
Defendant and Appellant.

Filed Apr 29 1955
William I. Sullivan, Clerk
By ..... S.F. Deputy

Plaintiff was employed by defendant, a common carrier by railroad, when he was injured while working on the construction of new railroad cars. In this action, which was brought under the Federal Employers' Liability Act, the parties stipulated to the existence of negligence and the amount of plaintiff's damages. The sole question left for determination was whether the act was applicable. The trial court concluded that plaintiff was entitled to the benefits of the act, and defendant has appealed from the ensuing judgment.

In February 1951, after being employed by defendant for ten years to repair railroad cars already in service, plaintiff began working as a carman welder on the construction of new cars. The cars were being built in accordance with a resolution adopted by defendant's board of directors which provided for the acquisition of 5,000 new cars and for their assignment to defendant and a subsidiary, the Texas and New Orleans Railroad Company. Another subsidiary, the

Southern Pacific Equipment Company, undertook the construction of 2,000 of the units, including 1,000 gondola cars allotted to the Texas Company. Defendant supplied the labor and shop facilities, paid the workmen and billed the equipment company for labor and certain other maintenance costs. The gondola cars, when completed, were to be shipped out of state and leased to defendant, which, in turn, was to sublease them to the Texas Company. Plaintiff was injured in July of 1951 while "welding corners" on one of the gondola cars.

In the shop where plaintiff worked there was a department for repairs and another for new construction, and positions in both departments were filled from the same seniority list. Every day some of the employees ordinarily engaged in making repairs were placed on new construction in order to offset vacancies created by absenteeism. Men on new construction could be transferred to repair work, and this was done on a few occasions, but plaintiff worked exclusively on new construction after being assigned to it.

The Federal Employers' Liability Act provides in part:

"Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall,

for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." (53 Stats. 1404; 45 U.S.C.A. § 51.)

It is the position of defendant that it is not liable under the act unless it can be said that in manufacturing railroad cars it was engaging in interstate commerce. This argument overlooks the effect of the second paragraph of the section quoted above, which was added by amendment in 1939. Under that paragraph, plaintiff is considered to have been employed by defendant in interstate commerce and is entitled to the benefits of the act if his duties were in the furtherance of such commerce or affected it in any way "directly or closely and substantially." (Ericksen v. Southern Pacific Co., 39 Cal. 2d 374, 378.)

The 1939 amendment was enacted to include injured employees previously excluded and to eliminate confusions and hardship to which they were subjected in choosing whether to bring suit under state or federal law. (See Shelton v. Thomson, 148 F. 2d 1; Wright v. New York Cent. R. Co., 33 N.Y.S. 2d 531; Ermin v. Pennsylvania R. Co., 36 F. Supp. 936, 940; Sen. Rep. No. 661, 76th Cong., 1st Sess. (1939).) In order to effectuate the purposes of the amended act, all doubt should be resolved in favor of its applicability. (See Lewis v. Industrial Acc. Com., 19 Cal. 2d 284, 286.)

The duties of plaintiff were at least as intimately connected with interstate commerce as those involved in a number of cases where the act, as it now reads, has been applied. (Shelton v. Thomson, 148 F. 2d 1 [operating a crane, located in a storehouse, to lift freight car wheels used to repair cars, including some which moved in interstate commerce]; Brainard v. Atchison, Topeka & Santa Fe Ry. Co., 87 F. Supp. 921 [assembling railroad switches

and "frogs" later to be installed on lines of track, including the main line carrying interstate commerce]: Agostino v. Pennsylvania R. Co., 50 F. Supp. 726 [constructing new tracks to replace existing tracks used in interstate commerce]; Ericksen v. Southern Pacific Co., 39 Cal. 2d 374 [inspecting lumber for fitness as railroad ties, some of which would cross state lines and would be used in repairing tracks carrying interstate traffic]; Southern Pac. Co. v. Ind. Acc. Com., 19 Cal. 2d 283 [repairing a freight car used in interstate and intrastate commerce]; Wills v. Terminal R. Ass'n of St. Louis [Mo. App.], 205 S.W. 2d 942 [installing a ventilating pipe in the roof of a building in which iron parts were forged for use in repairing equipment, including some used in interstate commerce]; Trucco v. Erie R. Co. [Pa.], 45 A. 2d 20 [constructing "strap hangers" used to replace parts in engines, some of which were devoted to interstate commerce]; Jordan v. Baltimore & Ohio R. Co. [W. Va.], 62 S.E. 2d 806 [laying tile in a sewer which, when finished, was to be connected to a "roundhouse" where engines moving in interstate commerce were serviced].)

Before the broad language now appearing in the act was added by the amendment in 1939, some decisions indicated that there was a distinction between an employee repairing equipment already operating in interstate commerce and one constructing equipment later to be used in that commerce, and it was held that the latter did not have federal coverage. (New York Central R. R. Co. v. White, 243 U.S. 188, 192; Raymond v. Chicago, Mil. & St. P. Ry. Co., 243 U.S. 43, 45; see Pedersen v. Delaware, Lack. & West. R. R. Co., 229 U.S. 146, 152.) The only case decided after 1939, however, in which such a distinction was applied is Moser v. Union Pac. R. Co. (1944) [Ida.], 147 P. 2d 336, where a divided court held that an employee working on the con-

struction of four miles of new track was not covered by the act. We cannot agree with the reasoning of the majority opinion in the Moser case. Under the language added by the amendment, an employee of a common carrier by railroad is entitled to the benefits of the act if his duties further interstate commerce or affect it in any way "directly or closely and substantially," regardless of whether the work which he is doing may be classified as new construction or repairs. The cars on which plaintiff was working were intended to be used in interstate commerce, and it is clear that the construction of the cars furthered such commerce.

The judgment is affirmed.

GIBSON, C. J.

We concur:
SHENK, J.
EDMONDS, J.
CARTER, J.
TRAYNOR, J.
SCHAUER, J.

In the Supreme Court of the State of California

S. F. No. 19090

CHARLES M. GILEO,
Plaintiff & Respondent,
vs.
SOUTHERN PACIFIC COMPANY,
Defendant & Appellant.

On appeal from the Superior Court in and for the City and County of San Francisco Superior Court No. 411036

The above entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered, IT IS ORDERED, ADJUDGED, AND DECREED by the Court that the JUDGMENT of the Superior Court in and for the City and County of San Francisco in the above entitled cause, be and the same is hereby affirmed. Respondent to recover costs on appeal.

I, WILLIAM I. SULLIVAN, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 29th day of April, 1955, and now remaining of record in my office.

WITNESS my hand and the seal of the Court, affixed at my office, this 31st day of May, A.D. 1955.

WILLIAM I. SULLIVAN, Clerk By PAUL DINOIA, Deputy

Moreno vs. Southern Pacific Company

Trial court and cause entitlement:

In the Superior Court of the State of California in and for the County of Sacramento

No. 88793

Epimenio Moreno
Plaintiff,

vs.

Southern Pacific Company, a corporation,
Defendant.

Order as to jurisdiction, opinion, and judgment, trial court:

(Minute Order—Title of court and cause omitted.)

Dept. Four

Monday, June 23rd. A.D. 1952.

Hon. J. O. Moncur, Judge Presiding.

TRIAL ON SPECIAL DEFENSE BEFORE TRIAL OF ANY OTHER CAUSE . . . *ORDER.*

(Submitted June 18, 1952)

The above entitled cause having been heretofore duly and regularly heard, argued and submitted to the Court by respective counsel and by the Court ordered Submitted, and now on this day the Court being fully advised in the premises made the following order to-wit:

"Court Determines It Has Jurisdiction in Said Action".

(Title of court and cause omitted.)

OPINION

The above entitled action was tried with a jury. At the conclusion of plaintiff's evidence a motion for a non-suit was made by defendant, which motion was denied by the Court. At the conclusion of the evidence in the case, and before argument, defendant moved for a directed verdict, which motion also was denied by the Court. After arguments by respective counsel and instructions by the Court, the jury returned a verdict in favor of plaintiff in the sum of $5,000, and thereupon defendant moved for judgment for defendant notwithstanding the verdict of the jury.

It is the contention of defendant that the evidence in this case failed to show any negligence on the part of defendant, and particularly that there was no evidence that if any negligence was shown, it was not a proximate cause of the accident.

It appears that plaintiff was employed by defendant near Roseville, California, in setting rails for a track in the switch yard of defendant. These rails were handled by a crane acting under power, and plaintiff, with another, was guiding the rails into place on the ties. As a rail was being lowered and plaintiff was holding the end of the rail, it appears that the rail diverged to some extent from a parallel line with the track to which it was to be attached, and as plaintiff was holding the rail his foot slipped so that the rail came in contact with his foot and occasioned the injuries set forth in the complaint. It appears that plaintiff's foot slipped on a metal plate which apparently was on the ground near his foot. There is no evidence that the defendant knew of the presence of the metal plate at that particular place or that plaintiff saw the plate or knew

that it was there. It appears from the evidence that the ground was wet but it does not show whether the plate was covered or was visible. The evidence does not show that defendant was guilty of any negligence whatsoever in the operation of the crane and if any negligence could be imputed to defendant it must be by reason of the presence of the metal plate on the ground upon which the plaintiff slipped, unless it can be said that the presence of this metal plate at that particular place would justify a finding that the presence of said metal plate rendered the area where plaintiff was employed an unsafe place for plaintiff to work.

It is my opinion that the evidence will not support a finding of negligence on the part of the defendant based upon the allegation that the place where plaintiff was working was an unsafe place.

I conclude that this unfortunate accident was unavoidable and not due to any negligence on the part of either party to the action. Therefore the motion for a judgment for defendant notwithstanding verdict of the jury will be granted and it will be so ordered.

Dated: July 21, 1952.

J. O. Moncur
Judge

(File endorsement omitted.)

(Title of court and cause omitted.)

JUDGMENT NOTWITHSTANDING VERDICT

This cause having come on for trial on June 18, 1952, before the above entitled Court, without a jury, on the special issue raised by the answer of the above named defendant that the Court has no jurisdiction over the subject matter of said action, and the plaintiff appearing per-

sonally and by his counsel, NATHANIEL S. COLLEY, Esq., and the defendant appearing and by its counsel ARTHUR B. DUNNE, Esq., and MESSRS. DEVLIN, DIEPENBROCK & WULFF, and evidence both oral and documentary having been adduced, and said issue having been submitted for decision, and the Court having decided said issue in favor of the plaintiff and having ordered plaintiff's counsel to prepare and submit findings of fact and conclusions of law (which have not yet been submitted), and

This cause having come on for trial on its merits before the above entitled court and jury on July 15, 1952, plaintiff appearing personally and by his counsel NATHANIEL S. COLLEY, Esq., and defendant appearing and by its counsel DEVLIN, DIEPENBROCK & WULFF, and oral and documentary evidence having been adduced and defendant having timely made a motion for a directed verdict, which motion was denied but should have been granted, and the jury having rendered its verdict in favor of plaintiff and against defendant in the sum of Five Thousand Dollars ($5,000.00), and prior to the entry of judgment on said verdict, said defendant having moved for a judgment notwithstanding said verdict, and it appearing to the satisfaction of the court that said motion should be granted, and good cause appearing therefor,

IT IS NOW ORDERED, ADJUDGED AND DECREED as follows, to-wit:

1. That the verdict rendered by the jury in the above entitled action on July 18, 1952, in favor of plaintiff and against defendant in the sum of Five Thousand Dollars ($5,000.00) be, and the same is hereby set aside.

2. That the plaintiff take nothing by reason of the above entitled action and said action be, and the same is hereby dismissed, and defendant SOUTHERN PACIFIC COM-

PANY, a corporation, do have and recover from said plaintiff its costs of suit herein incurred in the sum of ($242.58). $113.65

DATED: July 22, 1952.

J. O. MONCUR
Judge of the Superior Court

(Attestation, file and recording endorsements omitted.)

Opinion and judgment on appeal:

In the Supreme Court of the State of California In Bank

Sac. 6526

ESPIMENIO MORENO,
Plaintiff and Appellant,
v.
Southern Pacific Company, a corporation,
Defendant and Respondent.

Filed April 29, 1955
William I. Sullivan, Clerk
By ..... S.F. Deputy

Plaintiff appeals from a judgment against him in an action brought under the Federal Employers' Liability Act to recover damages for injuries he sustained while working for defendant railroad company. The court, sitting without a jury, took evidence on the question of whether the federal act applied and the case then proceeded to trial before a jury on the other issues. A verdict was returned for plaintiff, but the court entered judgment notwithstanding the verdict on the ground that there was not sufficient evidence of negligence.

The first question presented is whether the Federal Employers' Liability Act is applicable. Plaintiff started working for defendant on October 3, 1951, and was injured on December 19, while laying rails in a retarder yard which defendant was constructing for the purpose of facilitating the movement of freight trains by means of a new method of "switching" and classifying railroad cars. The yard was to be used in connection with defendant's main line of track and was opened to interstate traffic four months after plaintiff's injury.

Federal coverage has been extended to an employee laying tile in a sewer which, when finished, was to be connected to a "roundhouse" where engines moving in interstate commerce were serviced. (Jordan v. Baltimore & Ohio R. Co. (W. Va.), 62 S.E. 2d 806.) The act has also been held applicable to an employee laying rails on a new section of roadbed which, upon completion, was to be used in connection with the main line of track carrying interstate commerce. (Agostino v. Pennsylvania R. Co., 50 F. Supp. 726.) The court in the Agostino case stated that "the construction work, while new, was only an improvement such as an extension, alteration, replacement or repair . . . ." (50 F. Supp. at 730.)

In the present case, the construction was new, but the yard was intended as a substitute for the existing method of switching and classifying railroad cars. The proper designation of the work, however, is not important since the applicability of the act depends on whether an employee's duties further interstate commerce or affect it "in any way directly or closely and substantially." (Gileo v. Southern Pacific Company, ante, p. ....., 45 U.S.(A.) 51.) We are of the view that, under the circumstances involved here, plaintiff's duties furthered interstate commerce. He is,

therefore, considered to have been employed by defendant in that commerce and is entitled to the benefits of the act. (Gileo v. Southern Pacific Company, ante, p. .....)

The question remaining is whether there is substantial evidence supporting the implied finding of the jury that defendant was negligent. At the time of the accident, plaintiff was working as a member of a crew of three men. One of the men would operate a crane to lift a rail, and, while it was suspended horizontally, plaintiff and the other man would each take hold of one of its ends and guide it laterally until it was in the desired position over the roadbed on which it was to be laid. The crane operator would then be notified by signals to lower it. As plaintiff was guiding one end of a rail he slipped on a piece of metal and fell. The rail, which was suspended about three feet above the ground, dropped and struck his foot. No lowering signal had been given, and the rail came to rest 18 inches away from the point where it should have been laid. There is testimony that the crane operator could see plaintiff "at all times," and it may reasonably be inferred from the evidence that the rail which struck plaintiff was lowered prematurely due to the negligence of the crane operator.

The judgment is reversed with directions to enter judgment for plaintiff in accordance with the verdict.

GIBSON, C. J.

We concur:
SHENK, J.
EDMOND, J.
CARTER, J.
TRAYNOR, J.
SCHAUER, J.

In the Supreme Court of the State of California

Sac. No. 6520

EPIMENIO MORENO,
Plaintiff & Appellant,

vs.

SOUTHERN PACIFIC COMPANY,
Defendant & Respondent.

On appeal from the Superior Court in and for the County of Sacramento

The above entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered, IT IS ORDERED, ADJUDGED, AND DECREED by the Court that the JUDGMENT of the Superior Court in and for the County of Sacramento in the above entitled cause, be and the same is hereby reversed, with directions to enter judgment for plaintiff in accordance with the verdict. Appellant to recover costs on appeal.

I, WILLIAM I. SULLIVAN, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 29th day of April, 1955, and now remaining of record in my office.

WITNESS my hand and the seal of the Court, affixed at my office, this 31st day of May, A.D. 1955.

WILLIAM I. SULLIVAN, Clerk By PAUL DINOIA, Deputy

Aranda vs. Southern Pacific Company

Trial court and cause entitlement:

In the Superior Court of the State of California in and for the County of Sacramento

No. 87250

ROQUE ARANDA,
Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,
Defendant.

Order as to jurisdiction, opinion and judgment, trial court:

(Minute Order—Title of court and cause omitted)

Friday, February 15, 1952

Hon. John Quincy Brown, Judge
Superior Court Presiding

87250 Roque Aranda vs. Southern Pacific Company—
MEMORANDUM OPINION

This matter was previously ordered to be submitted and now on this day the court being fully advised in the premises ordered that the matter be submitted and ordered that the plaintiff has brought his case within the terms of the Act and that this court has jurisdiction for the purpose of trial. Let the necessary order be prepared in accordance herewith.

(Title of court and cause omitted.)

MEMORANDUM OPINION

This is a suit brought by the plaintiff against the defendant company, his employer, for damages alleged to have been sustained by plaintiff due to negligence of the defendant. The matter was set for trial before this Court, but before proceeding with the jury trial, it was stipulated that the Court should first hear and determine the question of whether or not the Federal Employers Liability Act was applicable. In other words, if this act is applicable, then the plaintiff may sue in the Superior Court. If, however, the Federal Act is not applicable, the plaintiff must be governed by the Workmen's Compensation Act and the matter heard before the Industrial Accident Commission of the State of California.

The Court heard evidence with regard to this issue, sitting without a jury, pursuant to said stipulation. It was established that the plaintiff was a molder, molding and assisting in the molding or casting of freight car and other wheels for the use of the Southern Pacific Company. He has been such for about thirty years. The Southern Pacific Company maintains the Sacramento Wheel Foundry at Sacramento, and has maintained this foundry for many decades. The facts which have been established have been well stated by both parties in their briefs, and there is no conflict with regard thereto.

The production in the wheel foundry is controlled by the defendant's stores department. At the beginning of the year the stores department gives the wheel foundry a blanket order to produce wheels. These wheels are then produced. Some of them are to be used as soon as axles are added, and others are stockpiled to be sent out wherever needed on the entire Southern Pacific line. Many of these

wheels are immediately sent to Portland, Oregon, where the axle assembly is affixed, the wheel and axle unit returned to the Sacramento, California, repair shop, where they are fitted upon the trains as needed. It is admitted that these wheels will be affixed to hundreds of freight cars which are moving in interstate commerce. The company's experience has proven that the best and cheapest method of molding the new wheels is by the melting down of the old wheels and adding certain other alloys. When the wheels on the cars become too worn for continued use they are taken off and this process is adopted as herein set forth. There are no other provisions for the "repair" of such wheels. *This is the only way in which the cars change wheels.*

Since defendant's main argument is based upon a distinction made in many of the cases between "manufacture" and "repair", this basic fact must be definitely borne in mind.

The Federal Employers Liability Act as amended in 1939 (53 Stat., 1404) provides as follows:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall in any way directly or closely and substantially, affect such commerce as above set forth shall for the purposes of this act be considered as being employed by such carrier in such commerce, and shall be considered as entitled to the benefits of this act."

Defendant in a very instructive and exhaustive brief has pointed out the history of the legislation, but this Court feels that the cases prior to 1939 have little bearing on the issue here. The defendant's argument is based upon the long line of cases which have drawn a distinction between "manufacture" and "commerce". This has been true for the reason that many interstate carriers carry on many other

activities. They might be engaged in running a local stage line, for instance, between, say, Sacramento and Stockton. If the activities were definitely only concerned with that particular line, this could be definitely said to be intrastate. Large corporations such as the Southern Pacific Company also may engage in extra-curricular activities as is pointed out by defendants, such as the maintenance of an office building. Those are clear cases. On the other hand if the plaintiff in this case had been definitely "repairing" a door, for instance, on the side of a freight car which had just come in from Portland, Oregon, and as soon as the "repairs" were done, the car moved on to El Paso, Texas, this would be a clear case of interstate commerce. This would be so even if it were a brand new door.

We are dealing here, however, with that vast group of fringe cases where the activities are in a twilight zone. The difficulty which Courts have had for many years is to place a label upon such activities. It is frequently impossible to definitely label an activity as inter- or intra-state commerce. For that reason there has been a trend towards liberalizing of the statutes in these matters.

How then, shall we construe the language of the section hereinabove set forth? If we use the word "furtherance of interstate commerce" or "directly or closely and substantially affecting such commerce", in a broader sense we practically obliterate intrastate commerce. If, on the other hand, we deal in such hair-splitting theories that "manufacturing" is a complete and separate and different business from that of "repairing" we will achieve just as absurd results in the other direction.

It is probably true that where a corporation is organized and does business strictly as a manufacturing concern such as the John Doe Car Wheel Company, which does nothing

but manufacture car wheels and sell them indiscriminately, that this probably would not be held to be interstate commerce. However, there is a phase that enters into the case at bar, and that is that all of these operations are merely departmental units of the defendant corporation, and are controlled entirely by the defendant. Had this plaintiff been working for an entirely independent corporation which had nothing to do with the parent company, then this probably could be urged, but here the whole matter is handled under one parental roof, and it seems to this Court that the Congress had just such a thing in mind when they admittedly liberalized the Act in 1939.

In vigorously putting forth the argument that the plaintiff in this case was engaged strictly in manufacture, the defendant places great reliance on the fact that many of the wheels are stockpiled for a period, and are not actually consigned to a specific freight car, and earmarked at the time they are made. Since this is so, defendant argues that the activities of the plaintiff here could not be under the catagory of "repairs" because he was not actually working upon a definite car at the time. This seems to this Court to be a hair-splitting theory. The whole chain of activity started with the taking off of the old car wheels, which are worn out, the transferring of those old car wheels into a vat where they are melted down, the pouring of this new melted material into new molds, the creation of the new car wheel, the affixing of the axles and the subsequent attaching of those axles and car wheels to freight cars in interstate commerce, seems to this Court to be one single operation.

The mere fact that the plaintiff is not personally present at the side of the freight car when the old wheel is taken off or the new wheel is put on seems to this Court to be immaterial.

It seems to be self-evident that No Wheel Can Be "Manufactured" Until Some Car Needs "Repair". This is absolutely true since the molten material cannot exist without the prior existence of the worn-out wheels. Without the first worn-out wheel there could be no creation of the new molten material. The mere fact that many of the wheels are stockpiled for a period does not seem to this Court to break the chain of causality between the creation of these new wheels and their running on the track, since it is the need for "repairs" which furnishes the material for the start of the so-called "manufacture". Thus if we must label this activity this Court would say that the process is both "manufacture" and "repair". The new wheels are in a sense "manufactured" and the cars are "repaired". It may be some time before a car which has lost its old wheels returns with its shiny new set on an interstate track, but it does not seem to this Court that time is of the essence here because the whole proceeding looks forward to and is indeed created for that purpose.

Thus it seems to this Court that even if we accept the yardstick pointed out by the defendant that unless the plaintiff can show that he was engaged in "repairing" rather than "manufacturing," he has shown that sufficiently for the purposes of the liberalized statute.

This Court sees no useful purpose in discussing all the cases which have been presented by the parties. The holding in one case frequently brings to mind a somewhat contrary holding in a very similar case. The law by its very nature, is not and can never be an exact science. Each case must be decided upon its own factual background. This Court is of the opinion that the plaintiff has brought his case within the terms of the Act and that this Court has jurisdiction for the purposes of trial.

Let the necessary order be prepared in accordance herewith.

Dated: February 15th, 1952.

JOHN QUINCY BROWN
Judge of the Superior Court

(File endorsement omitted.)

(Title of court and cause omitted.)

JUDGMENT ON VERDICT

THIS CAUSE came on regularly for trial N. S. Colley & M. Sakuma appearing as counsel for the plaintiff, and H. Wulff & V. Diepenbrock, of the firm of Devlin, Diepenbrock & Wulff for the defendant.

WHEREUPON, a jury of 12 persons was duly accepted, empaneled and sworn to try said cause. Witness of the part of the plaintiff and defendant were duly sworn and examined.

WHEREUPON, after hearing the evidence, the arguments of Counsel and instructions of the Court, the cause was submitted to the jury who retired to deliberate upon their verdict, and subsequently returned into court, and, being called, all answered to their names and then rendered the following verdict, which was accepted by the Court and entered on the minutes, as follows:

In the Superior Court of
The State of California
in and for
The County of Sacramento.

ROQUE ARANDA, Plaintiff — No. 87250

vs.

SOUTHERN PACIFIC COMPANY, Defendant — Dept. 2

VERDICT

WE the Jury in the above entitled action find for the Plaintiff and against the Defendant SOUTHERN PACIFIC COMPANY and assess Plaintiff's damages in the sum of $12,000.00, less the sum of $1448.57 heretofore paid by defendant to plaintiff. The net amount awarded is $10,551.43.

ALBERT G. PUIZ
Foreman

WHEREFORE, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged, and decreed, that ROQUE ARANDA plaintiff do have and recover from SOUTHERN PACIFIC COMPANY defendant, the sum of Ten thousand five hundred fifty one and 43/100 Dollars ($10,-551.43) with interest thereon at the rate of seven per cent per annum from the date hereof, till paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of $120.80.

(File and recording endorsements omitted.)

Opinion and judgment on appeal:

In the Supreme Court of the
State of California
In Bank
Sac. 6521

ROQUE ARANDA,
Plaintiff and Respondent,
v.
SOUTHERN PACIFIC COMPANY,
a corporation,
Defendant and Appellant.

Filed Apr 29 1955
William J. Sullivan, Clerk
By ..... Deputy

Plaintiff brought this action under the Federal Employers' Liability Act, seeking recovery for injuries sustained while working as a molder of freight car wheels in a foundry operated by defendant railroad company. He set forth three causes of action in his complaint, alleging that his injuries resulted, first, from negligent operation of a crane, second, from negligent maintenance of the crane, and, third, from failure to provide him with a safe place to work. The court, sitting without a jury, determined that the federal act was applicable, and the case then proceeded to trial before a jury on the other issues. A verdict was returned for plaintiff, and judgment was entered accordingly. Defendant appeals, contending that the federal act was not applicable and that there was not sufficient evidence to warrant submission to the jury of the issues raised by the third cause of action.

Applicability of the Federal Employers' Liability Act depends on whether plaintiff's duties were in the furtherance of interstate commerce or affected it "in any way

directly or closely and substantially." (Gileo v. Southern Pacific Company, ante, p. .....; 45 U.S.C.A. 51.) The freight car wheels which he molded were manufactured in accordance with annual orders from defendant's store department. Although the amount of production varied according to current demand, the wheels were not made for particular railroad cars and were taken, when completed, to defendant's storehouse. A few were sold to other companies, but almost all were sold to the Southern Pacific Equipment Company, a subsidiary of defendant, for construction of new cars or were used by defendant for maintenance purposes, including replacement of wheels on cars which defendant already operated in interstate commerce.

Federal coverage has been extended to employees injured while performing duties similar to those involved here. (Shelton v. Thomson, 148 F.2d 1 (operating a crane, located in a storehouse, to lift freight car wheels used to repair cars, including some which were operated in interstate commerce); Ericksen v. Southern Pacific Co., 39 Cal. 2d 374 (inspecting lumber for fitness as railroad ties, some of which would cross state lines and would be used to repair tracks carrying interstate traffic); Trucco v. Erie R. Co. (Pa.), 45 A. 2d 20 (constructing "strap hangers" used to replace parts of engines, some of which were devoted to interstate commerce).) In the present case, some of the wheels which plaintiff molded were to be used in repairing railroad cars moving in interstate commerce, and the importance of his work to that commerce was not reduced by the fact that the wheels were temporarily stored before being used. We are of the opinion that plaintiff's duties furthered interstate commerce. He is, therefore, considered to have been employed by defendant in interstate commerce

and is entitled to the benefits of the act." (Gileo v. Southern Pacific Company, ante, p. .....)

It is conceded that the evidence is sufficient to support the verdict based upon the first and second causes of action in which it was alleged that plaintiff's injuries resulted from the negligent operation of a crane and from the negligent maintenance of a crane. It is contended, however, that there was no evidence that defendant failed to provide plaintiff with a safe place to work, as alleged in the third cause of action and that the court erred in submitting this issue to the jury. Plaintiff worked near a large crane which stood in a circular area at the center of two concentric rings of wheel molds. Access to the crane through the double ring of molds was afforded by two openings, each 21 feet wide. The crane was equipped with a horizontal boom and with a cable which was attached to the end of the boom and was strung down through several pulleys to a hook. Molten metal was carried from a furnace to the 21-foot openings by means of a bucket-shaped ladle placed on a movable platform. When the molder and his helper were ready to fill the molds, the crane hook was fastened to the handle of the ladle, and the crane raised the ladle vertically and maintained it in a position several inches above the molds. The ladle, which was about two feet in diameter, was open at the top and was designed to drain from the bottom. The molder was required to be close to the ladle in order to adjust it over each mold and to fill the mold by opening the stopper at the bottom of the ladle.

At the time of the accident, plaintiff was standing between the inner and outer rings of molds and was preparing to open the stopper. The cable attached to the end of the boom slipped from three clamps which were holding it, and the ladle dropped against a mold, tipping and spilling the

contents of the ladle. Plaintiff, in attempting to escape from the molten metal, jumped over the inner ring of molds and landed in some of the spilled metal, suffering severe burns.

The degree of care required by the Federal Employers' Liability Act is that which a person of ordinary prudence would have exercised under the circumstances, and although there was no proof as to the practice in the industry with respect to the method commonly employed in the molding of wheels, evidence of custom is not indispensable. (Chicago, M. & St. P. Ry. Co. v. Moore, 166 F. 663, 668.) The fact that the metal was drained from the bottom of this container permitted an inference that, once the ladle was filled, a lid could have been placed on it without impeding the molding process. Pictures of the ladle and of the manner in which it was used were shown to the jury, and we cannot say as a matter of law that the jury could not properly conclude that it was feasible to equip the ladle with a lid which would have prevented the accident and that, in view of the hazard to workmen defendant should have provided such a lid. Accordingly, the issues raised by the third cause of action were properly submitted to the jury.

The judgment is affirmed.

GIBSON, C. J.

We concur:
SHENK, J.
EDMONDS, J.
CARTER, J.
TRAYNOR, J.
SCHAUER, J.

In the Supreme Court of the State of California

Sac. No. 6521

ROQUE ARANDA,
Plaintiff & Respondent,

vs.

SOUTHERN PACIFIC COMPANY,
Defendant & Appellant.

On appeal from the Superior Court in and for the County of Sacramento

The above entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered, IT IS ORDERED, ADJUDGED, AND DECREED by the Court that the JUDGMENT of the Superior Court in and for the County of Sacramento in the above entitled cause, be and the same is hereby affirmed. Respondent to recover costs on appeal.

I, WILLIAM I. SULLIVAN, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 29th day of April, 1955, and now remaining of record in my office.

WITNESS my hand and the seal of the Court, affixed at my office, this 31st day of May, A.D. 1955.

WILLIAM I. SULLIVAN, Clerk By PAUL DINOIA, Deputy

Eufrazia vs. Southern Pacific Company

Trial court and cause entitlement:

In the Superior Court of the State of California in and for the County of Sacramento

No. 90452

ALBERT EUFRAZIA,
Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,
a corporation,
Defendant.

Opinion, findings and judgment, trial court:

(Title of court and cause omitted.)

OPINION

The question presented to the Court is whether or not the plaintiff, who was injured while working for the Southern Pacific Co. on ends to be placed on gondolas, is entitled to bring a suit for his alleged damages under the Federal Employers' Liability Act, or whether his remedy is under the California Workmen's Compensation Act.

The question arises mainly by reason of the amendment of the Federal Employers' Liability Act passed in 1939. There is no question but that the provisions thereof have broadened the scope of those who may come within its terms; however, it has been definitely determined that not all employees working for a railroad and who are injured may claim the right to bring suit thereunder.

The facts are not in serious dispute. Therefore, it will not be necessary to make reference thereto to any great extent. The Southern Pacific Co. had entered upon a large expansion program, among which was the acquisition of one thousand gondola cars. These cars were being assembled or fabricated in Car Shop 9 of the S. P. Co. for the Southern Pacific Equipment Co. (hereafter referred to as the SPEC.)

In order to finance the plan of expansion, various contracts and obligations were necessary to be entered into.

The Southern Pacific Equipment Co. is a subsidiary of the S. P. Co. It is wholly owned by said Company, but with a different Board of Directors. It will be noted also that these gondolas are stenciled "T & NO", which stands for Texas and New Orleans R. R. Co., another subsidiary of the S. P. Co.

The financial company is The Pennsylvania Company for Banking and Trusts, Trustee. These matter are all set forth in defendant's Exhibit "F".

While the SPEC and T & NO R.R. Co. are subsidiaries of the S. P. Co., they are not, strictly speaking, the alter ego of the latter railroad company. There is no question but that the entire scheme for the S. P. Co. acquiring additional equipment was a legitimate project, and the various companies mentioned above were necessary, or at least desirable, in order to work out a plan of financing the program of expansion. In this regard reference is made to the cases of Cleaning and Pressing Co. vs. Hollywood L. Service, 217 Cal. 124, 129; Erkenbrecher vs. Grant, 187 Cal. 7, 11.

Plaintiff had been assigned to work in car shop nine as a reamer on the ends of the gondola cars. He was injured while so working on July 10th, 1952, a period of a little less than a month after his assignment.

The Federal Employers' Liability Act was amended in 1939, which greatly broadened the scope of those working for the various railroad companies who may bring suit under the provisions of said act.

The case is important to both sides. The question whether or not an employee of a railroad comes within its provisions is one of law; and this is true even though the facts may be in dispute. (Scarborough vs. Penn. Railroad, 32 A. 2nd. 603.)

The question presented raises the jurisdictional point whether the federal act applies or the injured workman or his family, if he happened to be killed, shall make claim under the provisions of the Workmen's Compensation Act? According to the decided cases involving this question, there is no alternative, even though the employee or the employer or both wish to proceed under the one or the other. The facts determine the remedy. Therefore, it may be, as existed in one of the cases cited by plaintiff, the workman so injured had secured an award under a Workmen's Compensation Act, but the employer, railroad, attacked the jurisdiction of the board making the award, and the Federal Court reversed the award and held that the Federal Act applied. (Scarborough vs. Penn. Ry. Co., 35 A 2d, 603)

It will be noted that if it be ultimately held, as several of the cases cited by plaintiff hold, that all employees of railroads engaged in interstate commerce come within the provisions of the Federal Act, then the provisions of the Workmen's Compensation Act of this state becomes a dead letter so far as they are concerned. In other words, under such a theory, such employees who may be injured will be deprived of the benefits of the provisions of said Workmen's Compensation Act.

The statement of one or two courts to the effect that *all employees of such railroad* come within the provisions of

the Federal Act was probably inadvertently made, or made without careful study of the act after amendment, *for the majority of the cases not only hold to the contrary, but such a determination would make the Federal Act as vulnerable to attack from a constitutional standpoint as it was in its first enactment.*

There are really two aspects to this case: First: What was plaintiff doing at the time of the accident in his work, in Car Shop 9? Second: Was this a temporary employment, so that the Court may consider his job prior to such employment or assignment to Car Shop 9?

First: Plaintiff was working as a reamer on ends to be attached to the gondolas. The SPEC was employing the S. P. Co. to assemble the cars. It was entirely new construction. True these cars were eventually to become a part of its own system, but the method of financing the program of expansion was through two subsidiary corporations, and through a financing company. The S. P. Co. only acquired a lease to the gondolas, which would ripen into a title when the underlying certificates were paid to the financing company.

It is deemed unimportant so far as the matter of financing the program of extension is concerned, except so far as the facts show that the employees of Car Shop 9 were engaged in new construction of assembling or fabricating material for the building of the gondola cars for SPEC.

If plaintiff is entitled to maintain a suit under the Federal Act for his injury, then it would seem to the Court, that we must hold that even the men who work on the material first delivered to Car Shop 9, before any fabrication was started, would be entitled to bring suit under such act, if injured. We might go even farther, and, for like reasons, come to the conclusion that those who drew the plans

for the construction of the gondolas would, in case of injury, be forced to bring suit therefor under the Federal Act. But it is the view of this Court that there can be no such holding, as will appear hereafter.

Adverting now to some of the principal cases after the amendment of the Act, while there still appears to be some uncertainty in the minds of some Courts under the facts in the individual case, there appears to be no dissent where there is new construction, particularly under facts somewhat parallel to those of the instant case, from the holding that the Federal Act does not apply.

Let us first take the Erickson case, (39 A C 385): That case, strongly relied upon by plaintiff, clearly distinguishes between new construction and the facts of the case itself. In this regard it is stated: "(3) It has been held that work on new tracks not yet in service is not covered by the act." Citing Moser vs. Union Pac. R. Co., 65 Idaho 479; 147 P 2d, 336, 153 ALR 341. With this statement the Court has in effect approved the holding in the case cited. Turning to the case cited, which contains a long and careful analysis of innumerable decisions both before and after the amendment of the Federal Act in 1939, we find the following:

> "While, at least prior to the 1939 amendment, a railroad employee engaged in new construction, as distinguished from repair or maintenance work, was generally held not to be engaged in interstate commerce with the purview of the federal act, the courts by no means agreed as to the tests by which to ascertain whether a certain activity constituted new construction or repair (maintenance) work. As stated in Gulf, M. & N. R. Co. v. Madden (1941) 190 Miss 374, 200 So 119, the difficulty consisted in applying the distinction between new construction and repair or maintenance work to a given state of facts.

As in other instances, such a distinction is easily drawn in clear-cut cases; where a new instrumentality is to be erected for future use in interstate commerce and the work is carried out far away from any instrumentality then in existence and used at that time for interstate commerce, as where the first railroad is constructed through a certain territory, the work is undoubtedly to be classified as new construction work. Conversely, where an instrumentality that, at the time of work, is being used in interstate commerce, is maintained in an effective condition by taking care of its existing parts and without adding new appliances, as where loose spikes in ties are tightened while the road is being used in interstate commerce, the work is as clearly to be classified as repair or maintenance work.

The difficulties arise from situations in the 'twilight zone,' in which the work is concerned at the same time with new appliances or structures which, though intended to be used in interstate commerce, have not yet been so used at the time of the accident, and also with instrumentalities then in existence which at that time are actually being used in interstate commerce. As to these situations the courts have recognized that it is sometimes difficult to draw the line of demarcation between construction work and repair or maintenance work. See, for instance, Oregon Short Line R. Co. v. Gubler (1925); (CCA 8th) 9 F (2d) 494 (writ of certiorari denied in (1926) 273 US 709, 71 L ed 851, 47 S Ct 100); Wallace v. New York, N. H. & H. R. Co. (1923) 99 Conn 404, 121 A 878; Ross v. Sheldon (1916) 176 Iowa 618, 154 NW 499; Boyer v. Pennsylvania R. Co. (1932) 162 Md 328, 159 A 909; Lombardo v. Pittsburgh & L. E. R. Co. (1927) 91 Pa Super Ct 307.

Since it is impossible to reconcile the inconsistent classifications made by the courts in the doubtful situation just described, the courts have held that each case must be decided in the light of its own peculiar facts. Wallace v. New York, N. H. & H. R. Co. (1923) 99 Conn 404, 121 A 878; Moser v. Union P. R. Co. (Idaho)

(reported herewith) ante, 341; Lewis v. Cleveland, C. C. & St. L. R. Co. (1926) 240 Ill App 332.

Stating that the line between new construction and repair or maintenance work is sometimes difficult to draw and is, in reality, one of degree rather than of real difference, the court in Wallace v. New York, N. H. & H. R. Co. (1923) 99 Conn 404, 124 A 878, said: 'No hard and fast rule can be devised by applying which we can automatically place a given case in the new construction column, or in the repair and maintenance column. Each case must be decided upon its own facts. Some will be so clear as to classify themselves, but the majority of the contested cases will range themselves not far from the border line between these two classes of cases.'

Attempts have also been made to describe in abstract language the line of demarcation. 'Whatever may be necessary to keep the subsisting railway, its structures and equipment, in a safe state for interstate traffic, or to maintain it in that state and improve the state, may be said to be an act of repair, which commonly embraces not only restoration but also renovation or renewal by any process of making good, strengthening, supplying, or mending. Century Dictionary, "repair"; Inglis v. Buttery (1878) LR 3 App Cas (Eng) 552, 565, 579—HL. In those instances where difficulty arises in determining whether labor or betterment upon an interstate line of railway is new construction work or repair and maintenance, the trend of decisions indicates that the doubt should be resolved in favor of the latter conclusion.' Boyer v. Pennsylvania R. Co. (1932) 162 Md 328, 159 A 909. To the same effect is Ross v. Sheldon (1916) 176 Iowa 618, 154 NW 499.

'It is common knowledge that railroad bridges are repaired by replacement of parts thereof, and frequently by the erection of new bridges, and at the same time commerce is carried on thereover without interruption. The erection of new parts or of a new bridge, under these conditions, is clearly the repair of the old

bridge, and the fact that the old bridge is being used while the repairs are being made does not take it out of the use of the railway company in its duty as a common carrier of interstate commerce.' State v. Bates & R. Constr. Co. (1916) 91 Wash 181, 157 P 482.

'A careful study of the authorities called to our attention has convinced us that the dividing line between the two classes of cases is whether the construction is an original construction never having been dedicated to interstate commerce, or whether it is the repair, rebuilding, replacement, or enlargement of an interstate instrumentality after it has been so characterized by use. The question is not whether the instrumentality, when repaired, reconstructed, or enlarged, is entirely made of new material or of a new design or of a larger size, but whether or not it is still the original instrumentality, repaired, reconstructed or enlarged, retaining the same location and existing for the same purpose. Repairs may be made by replacing an instrumentality in whole or in part so long as the purpose is to remedy a defect or supply an insufficiency. The object of enlarging the turntable was to supply a deficiency, therefore the rebuilding of it belongs to the operations designated as repairs when distinguished from original constructions.' Lombardo v. Pittsburgh & L. E. R. Co. (1927) 91 Pa Super Ct 307."

Looking at the amendment to the act it will be noted that it contains these provisions: "Any employee of a carrier, any part of whose duties shall be furtherance of interstate commerce or foreign trade; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purpose of this chapter, be considered as being entitled to the benefits of this chapter." So far as the first clause is concerned, it would seem quite clear that making new equipment for another corporation, although employed by the S. P. Co., cannot be said to be duties in furtherance of interstate or foreign commerce. New con-

struction has nothing to do with commerce. Does such work fall within the provisions of the second clause of the amendment? Does it in any way directly or closely and substantially affect such commerce?

Plaintiff was engaged in new construction work; the material was purchased by SPEC and delivered to the S. P. Co. by whom plaintiff was employed. Of course the fabrication of the gondolas, under such circumstances, had nothing to do with commerce, of any kind. Plaintiff's work was finished and completed when the gondolas were delivered or shipped by SPEC to its consignors.

Does the fact that new construction work such as involved herein, bring one who works thereon within the provisions of the Federal Act? The only argument which can be made in the affirmative is to claim that after the assembling or fabrication of the gondolas they were immediately placed on the S. P. Co. tracks for transportation to points outside of the State of California, and that the assembling of these parts with the immediate shipment by rail over the S. P. Co. lines does closely and substantially affect such commerce.

Thus, the activity of plaintiff must affect or produce some effect or influence on interstate commerce. The only work plaintiff does can have no possible influence or effect on commerce. His work is finished before the gondolas are turned over to the SPEC for shipment. Where equipment, such as engines and other rolling stock is brought in for repair, the men who work thereon affect interstate commerce, because the work they are doing is in furtherance thereof and which affects the same; the same is true of switchmen because they are handling interstate commerce traffic, and under the 1939 amendment they need not be so handling the same at the moment of an accident whereby such switchman was injured.

If is true that the amendment must be given a liberal construction in favor of the employees, but this does not justify an interpretation which does violence to the apparent intent of the wording of the act itself.

Second: Plaintiff makes the claim that prior to his assignment to Car Shop 9, he was working in interstate commerce; that he was only temporarily assigned to the work in Car Shop 9: that he was liable to be called by the S. P. Co. at any time to do his work in which he formerly was engaged, and hence when he was injured he was still privileged to sue under the provisions of the federal act.

The facts which were developed at the hearing showed that there was nothing said about whether the work in Car Shop 9 was to be merely temporary or more or less permanent. There was no testimony in the case, nor any intimation, that plaintiff was to be withdrawn from his employment of reaming ends of the gondolas. The expansion program required the construction of 1000 gondola cars, together with other cars which are not particularly involved in this proceeding. If we examine the photographs introduced in evidence as to the activities in Car Shop 9 in assembling these gondola cars, we note that it is a very large and continuous project. When the work started on the assembling of these gondolas does not appear; but there is an agreement which is dated September 29th, 1950, between the SPEC and The S. P. Co. in regard to the construction of the program of expansion. (Deft. Exhibit B) In defendant's Exhibit K, it refers to an order for 380 of the gondola cars, which appears to be the first order made for the payment to be made thereon. From the surrounding circumstances it may be a long time before all of these gondola cars are completed. How long, whether months or several years, was not disclosed by the evidence, so far as the Court can recall.

Plaintiff relies upon the case of Searborough vs. Penn. R. Co., supra, in his claim that even though he was not working in interstate commerce at the time of his injury, he may still claim the privileges of the act, as above noted. The case is in no way parallel in its factual aspects with the case at bar. The injured employee was regularly employed as a signalman. For some weeks he had been employed in installing new station lights, and was so employed at the time of the accident. The Court points out that both employments came within the provisions of the Federal Employers' Liability Act. In the course of the opinion the Court states: " . . . . If any part of the employee's duties (at the time of his injury or death) directly, closely, or substantially affected interstate or foreign commerce, the claimant would be considered entitled to the benefit of the act. The preponderance of service performed by railroad employees is interstate commerce. As to those who are constantly shifting from one class of service to another, the adoption of the amendment will provide uniform treatment in the event of injury or death while so employed." In quoting this portion of the amendment no intimation is intended that it is only where there is a shifting of employees as stated which is covered by the amended act; but that is one provision which has been definitely settled in favor of the employee.

In view of the foregoing, it is concluded that plaintiff must seek his remedy within the provisions of the California Workmen's Compensation Act, and not under the Federal Employers' Liability Act.

Dated: Dec. 31 1952

MALCOLM C. GLENN
Judge of the Superior Court

(File endorsement omitted.)

(Title of court and cause omitted.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

That the answer of the defendant filed in the above entitled matter pleads that the above entitled court has no jurisdiction of the subject matter of any of the alleged causes of action set forth in the complaint of plaintiff, and pursuant to Section 597 of the Code of Civil Procedure, the above entitled Court, upon motion of the above named defendant, heretofore having duly and regularly proceeded to the trial of said special defense before trial of any other issue in the case, Honorable Malcolm C. Glenn presiding, a jury having been waived by the respective parties hereto, the plaintiff appearing by his attorney THOMAS C. PERKINS, ESQ., and the defendant SOUTHERN PACIFIC COMPANY acting by its attorneys MESSRS. DEVLIN, DIEPENBROCK & WULFF, and evidence both oral and documentary having been adduced, the said special defense having been argued, briefed and submitted and after due consideration of the same, the Court now makes in writing the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT.

I

That at all times mentioned in said complaint the defendant SOUTHERN PACIFIC COMPANY was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and doing business in the State of California; that said defendant was at all times mentioned in said complaint and now is engaged in several businesses, among which are and is a common carrier by railroad in both interstate and intrastate commerce and the assembling and/or manufacturing of new railroad freight cars as an independent contractor for the Southern Pacific Equipment Company.

II

That on the 10th day of July, 1951, and for some time prior thereto, the plaintiff was employed by the defendant as a mechanic in the assembling and manufacturing of such new railroad freight cars which the defendant had contracted to assemble and build as an independent contractor pursuant to the terms of a written contract with the Southern Pacific Equipment Company, and that at all times herein mentioned the plaintiff and the defendant were not engaged in the conduct of the latter's business of a common carrier by railroad, but at all of such times were engaged in its business of assembling and/or manufacturing new freight cars as hereinabove stated.

III

That at all times herein mentioned no part of plaintiff's duties as such mechanic directly, closely and/or substantially affected or was in furtherance of said interstate or foreign commerce (as a carrier by railroad engaging in commerce between some of the several states).

CONCLUSIONS OF LAW.

As Conclusions of Law from the above and foregoing Facts, the Court holds as follows:

I.

That the above entitled Court has no jurisdiction over the subject matter of the above entitled action and that plaintiff must seek his remedy pursuant to the provisions of the California Workmen's Compensation Act.

II

That the plaintiff take nothing by his said complaint and,

that defendant do have judgment against plaintiff above named and its costs of suit herein incurred.

/s/ MALCOLM C. GLENN
Judge of the Superior Court.

(File endorsement omitted.)

(Title of court and cause omitted.)

JUDGMENT.

That the answer of the defendant filed in the above entitled matter pleads that the above entitled Court has no jurisdiction of the subject matter of any of the alleged causes of action set forth in the complaint of plaintiff, and pursuant to Section 597 of the Code of Civil Procedure, the above entitled Court, upon motion of the above named defendant, heretofore having duly and regularly proceeded to the trial of said special defense before trial of any other issue in the case, Honorable Malcolm C. Glenn presiding, a jury having been waived by the respective parties hereto, the plaintiff appearing by his attorney, THOMAS C. PERKINS, ESQ., and the defendant SOUTHERN PACIFIC COMPANY acting by its attorneys MESSRS. DEVLIN, DIEPENBROCK & WULFF, and evidence both oral and documentary having been adduced, the said special defense having been argued, briefed and submitted, and purusant to the order of the Court, Findings of Fact and Conclusions of Law have been heretofore prepared and proposed by the defendant, which said proposed findings were duly served upon the attorney for plaintiff, and there being no amendments proposed within the time allowed by law, or at all; and the Court having heretofore made and filed in writing its Findings of Fact and Conclusions of Law, and directed that judgment be entered in accordance therewith;

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED as follows, to-wit:

1. That the plaintiff take nothing by his said action and that said action be, and the same is, hereby dismissed.

2. That the defendant do have and recover its costs of suit against said plaintiff, taxed in the sum of ($.....).

Dated: January 26, 1953.

/s/ MALCOLM C. GLENN
Judge of the Superior Court.

(Attestation, file and recording endorsements omitted.)

Opinion and judgment on appeal:

In the Supreme Court of the
State of California
In Bank

Sac. 6522

ALBERT EUFRAZIA,
Plaintiff and Appellant,
v.
SOUTHERN PACIFIC COMPANY,
a corporation,
Defendant and Respondent.

Filed April 29, 1955
William I. Sullivan, Clerk
By.....
S.F. Deputy

BY THE COURT

Plaintiff was injured while employed by defendant railroad company as an advanced carman helper in the construction of parts for new railroad cars, and he brought this action under the Federal Employers' Liability Act. Before trial of the other issues, the court held a hearing

on the question of whether the federal act was applicable and concluded that it was not. Judgment was entered accordingly, and plaintiff appeals.

On June 13, 1951, plaintiff, who had worked for defendant during the previous nine months repairing railroad cars already in service, began assembling "ends" for new gondola cars and did this work exclusively until he was injured on July 10. When assembled, the "ends" were conveyed to a main assembly line in another part of the shop and were there attached to the cars. The construction project was the same as that involved in Gileo v. Southern Pacific Company, ante, p. ...., this day decided, where a welder was injured while working on one of the gondola cars. The factual situations in the two cases are substantially similar, and our decision holding the act applicable to Gileo is controlling here.

The judgment is reversed.

In the Supreme Court of the State of California

Sac. No. 6522

ALBERT EUFRAZIA,
Plaintiff & Appellant,

vs.

SOUTHERN PACIFIC COMPANY,
Defendant & Respondent.

On appeal from the Superior Court in and for the County of Sacramento

The above entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered, IT IS ORDERED, ADJUDGED, AND DECREED by the Court that the JUDGMENT of the Superior Court in and for the County of Sacramento in the above entitled cause, be and the same is hereby reversed. Appellant to recover costs on appeal.

I, WILLIAM I. SULLIVAN, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 29th day of April, 1955, and now remaining of record in my office.

WITNESS my hand and the seal of the Court, affixed at my office, this 31st day of May, A.D. 1955.

WILLIAM I. SULLIVAN, Clerk By PAUL DINOIA, Deputy

Eelk vs. Southern Pacific Company

Trial court and cause entitlement:

In the Superior Court of the State of California in and for the County of Sacramento

No. 87156

CHARLES EELK,
Plaintiff,
vs.
SOUTHERN PACIFIC CO., a corporation,
Defendant.

Opinion, findings and judgment, trial court:

(Title of court and cause omitted.)

MEMORANDUM OPINION

This is a suit brought by the plaintiff against the defendant company, his employer, for damages alleged to have been sustained by plaintiff due to negligence of the defendant. The matter was set for trial before this Court, but before proceeding with the jury trial, it was stipulated that the Court should first hear and determine the question of whether or not the Federal Employers' Liability Act was applicable. In other words, if this act is applicable, then the plaintiff may sue in the Superior Court. If, however, the Federal Act is not applicable, the plaintiff must be governed by the Workmen's Compensation Act and the matter heard before the Industrial Accident Commission of the State of California.

The Court heard evidence with regard to this issue, sitting without a jury pursuant to said stipulation. This point has been before this Court many times. In a case decided by the writer hereof, *Arranda vs. Southern Pacific Co.*, Sacramento County Superior Court No. 87250, wherein the Memorandum Opinion was filed on February 15, 1952, the writer held that the facts of that case showed that the plaintiff was engaged in repairing rather than manufacturing, as was contended by the defendant. Accordingly, this Court in that case held that the Superior Court had jurisdiction for the purposes of trial.

In most of the cases there is just a sufficient factual difference to place each case in an individual twilight zone.

However, a recent case in the Superior Court of Sacramento County, *Albert Eufrazia, plaintiff, vs. Southern Pacific Co., a corporation, Defendant*, No. 90452, an identical case factually with the case at bar, has just been decided by Honorable Malcolm C. Glenn, the Memorandum Opinion having been filed December 31, 1952. The facts in that case are identical with those in the instant matter. This Court has had ample opportunity to study the cases cited by both counsel in very exhaustive and informative briefs. It would serve no useful purpose here for this Court to write an opinion identical with that of Judge Glenn, and since this Court is in accord with Judge Glenn's Opinion, it will adopt that opinion for all purposes in regard to the instant case. That opinion, we quote as follows:

"The question presented to the Court is whether or not the plaintiff who was injured while working for the Southern Pacific Co. on ends to be placed on gondolas, is entitled to bring a suit for this alleged daniages under the Federal Employers' Liability Act, or whether his remedy is under the California Workmen's Compensation Act.

The question arises mainly by reason of the amendment of the Federal Employers' Liability Act passed in 1939. There is no question but that the provisions thereof have broadened the scope of those who may come within its terms; however, it has been definitely determined that not all employees working for a railroad and who are injured may claim the right to bring suit thereunder.

The facts are not in serious dispute. Therefore, it will not be necessary to make reference thereto to any great extent. The Southern Pacific Co. had entered upon a large expansion program, among which was the acquisition of one thousand gondola cars. These cars were being assembled or fabricated in Car Shop 9 of the S. P. Co. for the Southern Pacific Equipment Co. (hereafter referred to as the SPEC.)

In order to finance the plan of expansion, various contracts and obligations were necessary to be entered into.

The Southern Pacific Equipment Co. is a subsidiary of the S. P. Co. It is wholly owned by said Company, but with a different Board of Directors. It will be noted also that these gondolas are stencilled "T & NO", which stands for Texas and New Orleans R.R.Co., another subsidiary of the S. P. Co.

The financial company is the Pennsylvania Company for Banking and Trusts, Trustee. These matters are all set forth in defendant's Exhibit "F".

While the SPEC and T & NO R.R. Co. are subsidiaries of the S. P. Co., they are not, strictly speaking, the alter ego of the latter railroad company. There is no question but that the entire scheme for the S. P. Co. acquiring additional equipment was a legitimate project, and the various companies mentioned above were necessary, or at least desirable, in order to work out a plan of financing the

program of expansion. In this regard reference is made to the cases of Cleaning and Pressing Co. vs. Hollywood L. Service, 217 Cal. 124, 129, Erkenbrecher vs. Grant, 187 Cal. 7, 11.

Plaintiff had been assigned to work in Car shop nine as a reamer on the ends of the gondola cars. He was injured while so working on July 10th, 1952, a period of a little less than a month after his assignment.

The Federal Employers' Liability Act was amended in 1939, which greatly broadened the scope of those working for the various railroad companies who may bring suit under the provisions of said act.

The case is important to both sides. The question whether or not an employee of a railroad comes within its provisions is one of law; and this is true even though the facts may be in dispute. (Scarborough vs. Penn. Railroad, 32 A. 2d. 603.)

The question presented raises the jurisdictional point whether the federal act applies or the injured workman or his family, if he happened to be killed, shall make claim under the provisions of the Workmen's Compensation Act? According to the decided cases involving this question, there is no alternative, even though the employee or the employer or both wish to proceed under the one or the other. The facts determine the remedy. Therefore, it may be, as existed in one of the cases cited by plaintiff, the workman so injured had secured an award under the Workmen's Compensation Act, but the employer, railroad, attacked the jurisdiction of the board making the award, and the Federal Court reversed the award and held that the Federal Act applied. (Scarborough vs. Penn. Ry. Co., 35 A 2d, 603)

It will be noted that if it be ultimately held, as several of the cases cited by plaintiff hold, that all employees of rail-

roads engaged in interstate commerce come within the provision of the Federal Act, then the provisions of the Workmen's Compensation Act of this state becomes a dead letter so far as they are concerned. In other words, under such a theory, such employees who may be injured will be deprived of the benefits of the provisions of said Workmen's Compensation Act.

The statement of one or two courts to the effect that *all employees of such railroad* come within the provisions of the Federal Act was probably inadvertently made, or made without careful study of the act after amendment, *for the majority of the cases not only hold to the contrary, but such a determination would make the Federal Act as vulnerable to attack from a constitutional standpoint as it was in its first enactment.*

There are really two aspects to this case: First, What was plaintiff doing at the time of the accident in his work in Car Shop 9? Second: Was this a temporary employment, so that the Court may consider his job prior to such employment or assignment to Car Shop 9?

First: Plaintiff was working as a reamer on ends to be attached to the gondolas. The SPEC was employing the S. P. Co. to assemble the cars. It was entirely new construction. True these cars were eventually to become a part of its own system, but the method of financing the program of expansion was through two subsidiary corporations, and through a financing company. The S. P. Co. only acquired a lease to the gondolas, which would ripen into a title when the underlying certificates were paid to the financing company.

It is deemed unimportant so far as the matter of financing the program of extension is concerned, except so far as the facts show that the employees of Car Shop 9 were

engaged in new construction of assembling or fabricating material for the building of the gondola cars for SPEC.

If plaintiff is entitled to maintain a suit under the Federal Act for his injury, then it would seem to the Court, that we must hold that even the men who work on the material first delivered to Car Shop 9, before any fabrication was started, would be entitled to bring suit under such act, if injured. We might go even further, and, for like reasons, come to the conclusion that those who drew the plans for the construction of the gondolas would, in case of injury, be forced to bring suit therefor under the Federal Act. But it is the view of this Court that there can be no such holding, as will appear hereafter.

Adverting now to some of the principal cases after the amendment of the Act, while there still appears to be some uncertainty in the minds of some Courts under the facts in the individual case, there appears to be no dissent where there is new construction, particularly under facts somewhat parallel to those of the instant case, from the holding that the Federal Act does not apply.

Let us first take the Erickson case, (39 A C 385): That case, strongly relied upon by plaintiff clearly distinguishes between new construction and the facts of the case itself. In this regard it is stated: "(3) It has been held that work on new tracks not yet in service is not covered by the act." Citing Moser vs. Union Pac. R. Co., 65 Idaho 479; 147 P2d, 336, 153 ALR 341. With this statement the Court has in effect approved the holding in the case cited. Turning to the case cited, which contains a long and careful analysis of innumerable decisions both before and after the amendment of the Federal Act in 1939, we find the following:

> "While, at least prior to the 1939 amendment, a railroad employee engaged in new construction, as distin-

guished from repair or maintenance work, was generally held not to be engaged in interstate commerce with the purview of the federal act, the courts by no means agreed as to the tests by which to ascertain whether a certain activity constituted new construction or repair (maintenance) work. As stated in Gulf, M. & N. R. Co. v. Madden (1941) 190 Miss 374, 200 So 119, the difficulty consisted in applying the distinction between new construction and repair or maintenance work to a given state of facts.

As in other instances, such a distinction is easily drawn in clear-cut cases; where a new instrumentality is to be erected for future use in interstate commerce and the work is carried out far away from any instrumentality then in existence and used at that time for interstate commerce, as where the first railroad is constructed through a certain territory, the work is undoubtedly to be classified as new construction work. Conversely, where an instrumentality that, at the time of work, is being used in interstate commerce, is maintained in an effective condition by taking care of its existing parts and without adding new appliances, as where loose spikes in ties are tightened while the road is being used in interstate commerce, the work is as clearly to be classified as repair or maintenance work.

The difficulties arise from situations in the 'twilight zone,' in which the work is concerned at the same time with new appliances or structures which, though intended to be used in interstate commerce, have not yet been so used at the time of the accident, and also with instrumentalities then in existence which at that time are actually being used in interstate commerce. As to these situations the courts have recognized that it is sometimes difficult to draw the line of demarcation between construction work and repair or maintenance work. See, for instance, Oregon Short Line R. Co. v. Gubler, (1925); (CCA 8th) 9 F (2d) 494 (writ of certiorari denied in (1926) 273 US 709, 71 L ed 851, 47

S Ct 100); Wallace v. New York, N. H. & H. R. Co. (1923) 99 Conn 404, 121 A 878; Ross v. Sheldon (1916) 176 Iowa 618, 154 NW 499; Boyer v. Pennsylvania R. Co. (1927) 91 Pa Super Ct 307.

Since it is impossible to reconcile the inconsistent classifications made by the courts in the doubtful situation just described, the courts have held that each case must be decided in the light of its own peculiar facts. Wallace v. New York, N. H. & H. R. Co. (1923) 99 Conn 404, 121 A 878; Moser v. Union P. R. Co. (Idaho) (reported herewith) ante, 341; Lewis v. Cleveland, C. C. & St. L. R. Co. (1926) 240 Ill App 332.

Stating that the line between new construction and repair or maintenance work is sometimes difficult to draw and is, in reality, one of degree rather than of real difference, the court in Wallace v. New York, N. H. & H. R. Co. (1923) 99 Conn 404; 121 A 878, said: 'No hard and fast rule can be devised by applying which we can automatically place a given case in the new construction column, or in the repair and maintenance column. Each case must be decided upon its own facts. Some will be so clear as to classify themselves, but the majority of the contested cases will range themselves not far from the border line between these two classes of cases.'

Attempts have also been made to describe in abstract language the line of demarcation. 'Whatever may be necessary to keep the subsisting railway, its structures and equipment, in a safe state for interstate traffic, or to maintain it in that state and improve the state, may be said to be an act of repair, which commonly embraces not only restoration but also renovation or renewal by any process of making good, strengthening, supplying, or mending. Century Dictionary, "repair"; Inglis v. Buttery (1878) LR 3 App Cas (Eng) 552, 565, 579—HL. In those instances where difficulty arises in determining whether labor or betterment upon an interstate line of railway is new construction work or

repair and maintenance, the trend of decisions indicates that the doubt should be resolved in favor of the latter conclusion.' Boyer v. Pennsylvania R. Co. (1932) 162 Md 328, 159 A 909. To the same effect is Ross v. Sheldon (1916) 176 Iowa 618, 154 NW 499.

'It is common knowledge that railroad bridges are repaired by replacement of parts thereof, and frequently by the erection of new bridges, and at the same time commerce is carried on thereover without interruption. The erection of new parts or of a new bridge, under these conditions, is clearly the repair of the old bridge, and the fact that the old bridge is being used while the repairs are being made does not take it out of the use of the railway company in its duty as a common carrier of interstate commerce.' State v. Bates & R. Constr. Co. (1916) 91 Wash 181, 157 p 482.

'A careful study of the authorities called to our attention has convinced us that the dividing line between the two classes of cases is whether the construction is an original construction never having been dedicated to interstate commerce, or whether it is the repair, rebuilding, replacement, or enlargement of an interstate instrumentality after it has been so characterized by use. The question is not whether the instrumentality, when repaired, reconstructed, or enlarged, is entirely made of new material or of a new design or of a larger size, but whether or not it is still the original instrumentality, repaired, reconstructed or enlarged, retaining the same location and existing for the same purpose. Repairs may be made by replacing an instrumentality in whole or in part so long as the purpose is to remedy a defect or supply an insufficiency. The object of enlarging the turntable was to supply a deficiency, therefore the rebuilding of it belongs to the operations designated as repairs when distinguished from original constructions.' Lombardo v. Pittsburgh & L.E.R. Co. (1927) 91 Pa Super Ct 307.".

Looking at the amendment to the act it will be noted that it contains these provisions: "Any employee of a carrier, any part of whose duties shall be furtherance of interstate commerce or foreign trade; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purpose of this chapter, be considered as being entitled to the benefits of this chapter." So far as the first clause is concerned, it would seem quite clear that making new equipment for another corporation, although employed by the S. P. Co., cannot be said to be duties in furtherance of interstate or foreign commerce. New construction has nothing to do with commerce. Does such work fall within the provisions of the second clause of the amendment? Does it in any way directly or closely and substantially affect such commerce?

Plaintiff was engaged in new construction work; the material was purchased by SPEC and delivered to the S. P. Co. by whom plaintiff was employed. Of course the fabrication of the gondolas, under such circumstances, had nothing to do with commerce, of any kind. Plaintiff's work was finished and completed when the gondolas were delivered or shipped by SPEC to its consignors.

Does the fact that new construction work such as involved herein, bring one who works thereon within the provisions of the Federal Act? The only argument which can be made in the affirmative is to claim that after the assembling or fabrication of the gondolas they were immediately placed on the S. P. Co. tracks for transportation to points outside of the State of California, and that the assembling of these parts with the immediate shipment by rail over the S. P. Co. lines does closely and substantially affect such commerce.

Thus, the activity of plaintiff must affect or produce some effect or influence on interstate commerce. The only

work plaintiff does can have no possible influence or effect on commerce. His work is finished before the gondolas are turned over to the SPEC for shipment. Where equipment, such as engines and other rolling stock is brought in for repair, the men who work thereon affect interstate commerce, because the work they are doing is in furtherance thereof and which affects the same; the same is true of switchmen because they are handling interstate commerce traffic, and under the 1939 amendment they need not be so handling the same at the moment of an accident whereby such switchman was injured.

It is true that the amendment must be given a liberal construction in favor of the employees, but this does not justify an interpretation which does violence to the apparent intent of the wording of the act itself.

Second: Plaintiff makes the claim that prior to his assignment to Car Shop 9, he was working in interstate commerce; that he was only temporarily assigned to the work in Car Shop 9; that he was liable to be called by the S. P. Co. at any time to do his work in which he formerly was engaged, and hence when he was injured he was still privileged to sue under the provisions of federal act.

The facts which were developed at the hearing showed that there was nothing said about whether the work in Car Shop 9 was to be merely temporary or more or less permanent. There was no testimony in the case, nor any intimation, that plaintiff was to be withdrawn from his employment of reaming ends of the gondolas. The expansion program required the construction of 1000 gondola cars, together with other cars which are not particularly involved in this proceeding. If we examine the photographs introduced in evidence as to the activities in Car Shop 9 in assembling these gondola cars, we note that it is a very

large and continuous project. When the work started on the assembling of these gondolas does not appear; but there is an agreement which is dated September 29th, 1950, between the SPEC and the S. P. Co. in regard to the construction of the program of expansion. (Deft. Exhibit B) In defendant's Exhibit K, it refers to an order for 380 of the gondola cars, which appears to be the first order made for the payment to be made thereon. From the surrounding circumstances it may be a long time before all of these gondola cars are completed. How long, whether months or several years, was not disclosed by the evidence, so far as the Court can recall.

Plaintiff relies upon the case of Scarborough vs. Penn. R. Co., supra, which held that even though he was not working in interstate commerce at the time of l... injury, he may still claim the privileges of the act, as above noted. The case is in no way parallel in its factual aspects with the case at bar. The injured employee was regularly employed as a signalman. For some weeks he had been employed in installing new station lights, and was so employed at the time of the accident. The Court points out that both employments came within the provisions of the Federal Employers' Liability Act. In the course of the opinion the Court states: " . . . . If any part of the employee's duties (at the time of his injury or death) directly, closely, or substantially affected interstate or foreign commerce, the claimant would be considered entitled to the benefit of the act. The preponderence of service performed by railroad employees is interstate commerce. As to those who are constantly shifting from one class of service to another, the adoption of the amendment will provide uniform treatment in the event of injury or death while so employed." In quoting this portion of the amendment no

intimation is intended that it is only where there is a shifting of employees as stated which is covered by the amended act; but that is one provision which has been definitely settled in favor of the employee.

In view of the foregoing, it is concluded that plaintiff must seek his remedy within the provisions of the California Workmen's Compensation Act, and not under the Federal Employers' Liability Act.

Dated: December 31, 1952.

Malcolm C. Glenn
Judge of the Superior Court"

This Court wishes to again emphasize the point that if the FELA be so construed that the words, "shall in any way directly or closely and substantially affect such commerce . . ." shall mean that all employees of railroads engaged in interstate commerce come within the provisions of the Federal Act, then this would render nugatory the provision of the Workmen's Compensation Act of this state, and this Court would have grave doubts as to the constitutionality of the FELA if so interpreted.

It should be remarked that nearly all of these cases are in this twilight zone heretofore remarked by this Court. True, there may be great difficulties in determining where repair stops and manufacture begins, and true, there may be difficulties in determining where manufacture stops and some form of transit begins, but in this case it seems to this court that we have clearly a manufacturing case here. For the reasons above stated, and the reasoning adopted in the Eufrazia case, supra, this Court is of the opinion that the plaintiff has not brought his case within the terms of the Federal Act, and that the Superior Court has no jurisdiction for the purposes of trial.

Let the necessary order be prepared in accordance herewith.

Dated: February 9, 1953.

JOHN QUINCY BROWN
Judge of the Superior Court

(File endorsement omitted.)

(Title of court and cause omitted.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Defendant's answer to the complaint of plaintiff having set up the defense that at all times and places mentioned in the complaint the defendant was not engaged then and there as a common carrier by railroad in interstate or any commerce, and also the defense that at said time and place the plaintiff was not employed by the defendant in interstate or any commerce, and that the accident complained of did not arise while plaintiff and defendant were, or either of them was, engaged in the conduct of interstate or any commerce, and pursuant to Section 597 of the Code of Civil Procedure, and upon stipulation of the parties the Court having proceeded to the trial of this special issue or defense before the trial of the merits of the plaintiff's alleged cause of action, Honorable John Quincy Brown presiding, a jury having been waived by the respective parties, and the plaintiff appearing personally and by his attorney, ANTHONY J. SCALORA, ESQ., and the defendant SOUTHERN PACIFIC COMPANY appearing by its attorneys, MESSRS. DUNNE, DUNNE & PHELPS and MESSRS. DEVLIN, DIEPENBROCK & WULFF, and evidence both oral and documentary having been adduced, and this special issue or defense having been argued, briefed and submitted, the Court now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT.

I

That at all times mentioned in the complaint, the defendant, SOUTHERN PACIFIC COMPANY, was and now is a corporation duly organized and existing under the laws of the State of Delaware, and doing business in the State of California; that at all times and places mentioned in said complaint, the defendant was engaged solely in the manufacturing of new railroad freight cars and was not engaging in transportation or in interstate or any commerce, as a railroad or as a common or any carrier, or otherwise.

II

That on the 22nd day of June, 1951, and at all times mentioned in said complaint, plaintiff was employed by defendant solely in the manufacturing of new railroad freight cars then and there being built by the Southern Pacific Equipment Company under a contract of sale to a third person; and that pursuant to the terms of a written contract between defendant and Southern Pacific Equipment Company, the defendant was to provide all necessary shop facilities and labor for the construction and manufacture of new railroad freight cars and upon the completion of the manufacture thereof, the same were to be delivered by said Southern Pacific Equipment Company to the third party purchaser.

III

That at all times mentioned in said complaint, no part of plaintiff's duties as an employee were the furtherance of interstate or foreign commerce or did in any way directly or closely and/or substantially affect such commerce.

CONCLUSIONS OF LAW.

As Conclusions of Law from the above and foregoing Facts, the Court holds as follows:

I

That the above entitled Court has no jurisdiction over the subject matter of the above entitled action and that plaintiff's sole remedy is under the provisions of the Workmen's Compensation Act of the State of California.

II

That plaintiff take nothing by his complaint and that defendant do have judgment against plaintiff and recover its costs of suit herein incurred.

Dated: March 10, 1953.

/s/ JOHN QUINCY BROWN
Judge of the Superior Court.

(File endorsement omitted.)

(Title of court and cause omitted.)

JUDGMENT

Defendant's answer to the complaint of plaintiff having set up the defense that at all times and places mentioned in the complaint the defendant was not engaged then and there as a common carrier by railroad in interstate or any commerce, and also the defense that at said time and place the plaintiff was not employed by the defendant in interstate or any commerce, and that the accident complained of did not arise while plaintiff and defendant were, or either of them was, engaged in the conduct of interstate or any commerce, and pursuant to Section 597 of the Code of Civil Procedure, and upon stipulation of the parties the Court having proceeded to the trial of this special issue or defense

before the trial of the merits of the plaintiff's alleged cause of action, Honorable John Quincy Brown presiding, a jury having been waived by the respective parties, and the plaintiff appearing personally and by his attorney, ANTHONY J. SCALORA, ESQ., and the defendant SOUTHERN PACIFIC COMPANY appearing by its attorneys, MESSRS. DUNNE, DUNNE & PHELPS and MESSRS. DEVLIN, DIEPENBROCK & WULFF, and evidence both oral and documentary having been adduced, and this special issue or defense having been argued, briefed and submitted, and pursuant to the order of the Court, Findings of Fact and Conclusions of Law having been heretofore prepared and proposed by the defendant, which said proposed findings were duly served upon the attorney for plaintiff, and there being no amendments proposed within the time allowed by law, or at all, and the Court having heretofore made and filed in writing its Findings of Fact and Conclusions of Law, and directing that judgment be entered in accordance therewith;

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED as follows, to-wit:

1. That the plaintiff take nothing by his said action and that said action be, and the same is, hereby dismissed.

2. That the defendant do have and recover its costs of suit against said plaintiff, taxed in the sum of .....

Dated: March 10, 1953.

/s/ JOHN QUINCY BROWN
Judge of the Superior Court.

(Attestation, file and recording endorsements omitted.)

Opinion and judgment on appeal:

In the Supreme Court of the State of California

In Bank

Sac. 6523

CHARLES EELK,
Plaintiff and Appellant,
v.
SOUTHERN PACIFIC COMPANY, a corporation,
Defendant and Respondent.

Filed Apr 29 1955
William I. Sullivan, Clerk
By ..... S.F. Deputy

BY THE COURT

Plaintiff, who was employed by defendant railroad company as a carman helper, was injured while working on the construction of new railroad cars, and he brought this action under the Federal Employers' Liability Act. Before trial of the other issues, the court held a hearing on the question of whether the federal act was applicable and concluded that it was not. Judgment was entered accordingly, and plaintiff appeals.

Defendant first employed plaintiff on November 7, 1950, and assigned him to repairing railroad cars already in service. He was placed on construction of new railroad cars from December 1 until January 8, 1951, at which time, apparently due to a shortage of construction materials, he was reassigned to repairs. On February 13, he again started doing new construction work, and he was so engaged exclusively until June 22 when he was injured while riveting sides on a

new gondola car. The construction project was the same as that involved in Gileo v. Southern Pacific Company, ante, p. ....., this day decided, where a welder was injured while working on one of the gondola cars. The factual situations in the two cases are substantially similar, and our decision holding the act applicable to Gileo is controlling here.

The judgment is reversed.

In the Supreme Court of the State of California

Sac. No. 6523

CHARLES ELK,
Plaintiff & Appellant,

vs.

SOUTHERN PACIFIC COMPANY,
Defendant & Respondent.

On appeal from the Superior Court in and for the County of Sacramento

The above entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered, IT IS ORDERED, ADJUDGED, AND DECREED by the Court that the JUDGMENT of the Superior Court in and for the County of Sacramento in the above entitled cause, be and the same is hereby reversed. Appellant to recover costs on appeal.

I, WILLIAM I. SULLIVAN, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 29th day of April, 1955, and now remaining of record in my office.

WITNESS my hand and the seal of the Court, affixed at my office, this 31st day of May, A.D. 1955.

WILLIAM I. SULLIVAN, Clerk By PAUL DINOIA, Deputy

MAR 1 7 1956
HAROLD B. WILLEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM 1955

No. 257

SOUTHERN PACIFIC COMPANY, a Corporation,

Petitioner,

v.

CHARLES M. GILEO, EPIMENIO MORENO, ROQUE ARANDA, ALBERT EUFRAZIA and CHARLES EELK

Brief for Petitioner Southern Pacific Company

On Writ of Certiorari to the Supreme Court of the State of California

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In the Supreme Court of the United States

OCTOBER TERM 1955

No. 257

SOUTHERN PACIFIC COMPANY, a Corporation,

Petitioner,

v.

CHARLES M. GILEO, EPIMENIO MORENO, ROQUE ARANDA, ALBERT EUFRAZIA and CHARLES ELK

Brief for Petitioner Southern Pacific Company

On Writ of Certiorari to the Supreme Court of the State of California

PRELIMINARY

On April 29, 1955, the Supreme Court of California decided 5 cases, then pending in that court, entitled and numbered (in that court) as follows:

Charles M. Gileo, Plaintiff and Respondent, v. Southern Pacific Company, a corporation, Defendant and Appellant, SF No. 19090 (R1-242);

Epimenio Moreno, Plaintiff and Appellant, v. Southern Pacific Company, a corporation, Defendant and Respondent, Sac. No. 6520 (R243-302);

Roque Aranda, Plaintiff and Respondent, v. Southern Pacific Company, a corporation, Defendant and Appellant, Sac. No. 6521 (R302-383);

Albert Eufrazia, Plaintiff and Appellant, v. Southern Pacific Company, a corporation, Defendant and Respondent, Sac. No. 6522 (R384-528); and

Charles Eelk, Plaintiff and Appellant, v. Southern Pacific Company, a corporation, Defendant and Respondent, Sac. No. 6523 (R529-643).

These cases all involve "identical or closely related questions" (Rules U.S. Sup. Ct., Rule 23 subd. 5). In each a plaintiff-employee sued Southern Pacific Company, his employer, to recover damages for personal injuries received by him in the course of his employment in California. In each the plaintiff charged the defendant, as his employer, with negligence and based his action on the Federal Employers' Liability Act (45 USC § 51 ff). In each the defendant-employer asserted that the Federal Employers' Liability Act had no application because the activity in which the employer and employee were engaged was not common carriage by railroad but was manufacturing (*Gilco, Eufrazia* and *Eelk*, assembly line new car construction; *Aranda*, wheel making in a wheel foundry) or new construction (*Moreno*, construction of a new "retarder yard"), did not affect interstate commerce, and that the court had no jurisdiction because the employee's sole remedy was under the California Workmen's Compensation Act (Labor Code, Div. IV, § 3201 ff; *Scott v. I. A. C.*, 46 A.C. 75, 293 P2d ..., ...). In each case the Supreme Court of California held that the Federal Employers' Liability Act, by reason of the 1939 amendment to § 1, applied and held against the position of Southern Pacific Company, the employer-defendant. Deeming itself aggrieved Southern Pacific Company, the defendant-em-

ployer, agreeably to subdivision 5 of Rule 23 of the Rules of this Court filed a single petition for a writ of certiorari to review the judgments of the Supreme Court of California.[1] The petition was granted on October 10, 1955. (R643)

OPINIONS BELOW

Gileo v. Southern Pacific Company. The trial court rendered no opinion. The opinion of the District Court of Appeal of the State of California, First Appellate District, Division Two (R235-241; App. to pet. for cert., pp. 5-12)[2] is reported in 124 A.C.A.[3] 951 and 269 P2d 150. The opinion of the Supreme Court of California (R229-233; App. to pet. for cert. 13-17) is reported in 44 C2d 539 and 282 P2d 872.

Moreno v. Southern Pacific Company. The opinion of the trial court (R249, 250; App. to pet. for cert. 20, 21), filed on the granting of defendant's motion for judgment *n.o.v.*, is not reported.[4] The appeal from the judgment was to the District Court of Appeal of the State of California, Third Appellate District. By order of the Supreme Court of California the case was transferred to the Supreme Court of California before decision by the District Court of Appeal

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1. A single consolidated record was filed. The record below, in each case, is a unit and forms a unified and separate part of the printed Transcript of Record, as indicated above.

2. The opinions are printed in the record as indicated below and, agreeably to Rule 23-1(i), in an appendix to the petition for certiorari.

3. Advance California Appellate Reports, the advance sheets of the opinions of the District Courts of Appeal of the State of California. The Supreme Court of California having granted a hearing and transferred this case to the Supreme Court for decision the opinion of the District Court of Appeal will not be officially reported.

4. The court directed that judgment in favor of the defendant be entered upon the ground that there was no evidence of negligence on the part of the defendant. The opinion does not deal with the question presented here.

and, by consequence, there is no opinion of the District Court of Appeal (R296, 301, 302). The opinion of the Supreme Court of California (R297-299; App. to pet. for cert. 23-25) is reported in 44 C2d 547 and 282 P2d 877.

Aranda v. Southern Pacific Company. The opinion of the trial court (R378-382; App. to pet. for cert. 28-33) is not reported. The appellate procedure was the same as in *Moreno* and there is no opinion of the District Court of Appeal.[5] (R373, 383) The opinion of the Supreme Court of California (R 374-377; App. to pet. for cert. 35-38) is reported in 44 C2d 543 and 282 P2d 875.

Eufrazia v. Southern Pacific Company. The opinion of the trial court (R393-402; App. to pet. for cert. 40-50) is not reported. The procedure on appeal was the same as in *Moreno* and there is no opinion of the District Court of Appeal. (R525, 528) The opinion of the Supreme Court of California (R526; App. to pet. for cert. 54, 55) is reported in 44 C2d 881, and 282 P2d 879.

Eelk v. Southern Pacific Company. The opinion of the trial court (R535-546; App. to pet. for cert. 57-70) is not reported. The proceedings on appeal were the same as in *Moreno* and there is no opinion of the District Court of Appeal. (R639, 642) The opinion of the Supreme Court of California (R640, 641; App. to pet. for cert. 74, 75) is reported in 44 C2d 882 and 282 P2d 880.

JURISDICTION

The judgments of the Supreme Court of California sought to be reviewed, a separate judgment in each case, were rendered and entered on April 29, 1955. (R233, 299, 377, 527,

5. In each of the last four cases the certificate of the clerk of the District Court of Appeal shows that the four cases were argued together but transferred to the Supreme Court before submission was ordered.

641). There was no order in any of the cases respecting a rehearing or granting an extension of time within which to petition for certiorari. The judgments have become final (California Rules on Appeal, Rule 24) so far as the court below is concerned and remittitures issued (California Rules on Appeal, Rule 25) on May 31, 1955. (R233, 300, 377, 527, 641). The petition for certiorari was served on July 20, 1955 and filed here on July 22, 1955. Notice of filing, of the case number and of consist of the record was served August 3, 1955. The petition was granted October 10, 1955, (R643) The jurisdiction of this Court is invoked on the ground the court below decided appropriately raised federal questions of substance, the scope, effect and application of the Federal Employers' Liability Act (*Brown v. Western Railway of Alabama*, 338 US 294, 94 L ed 100; *Brady v. Southern R. Co.*, 320 US 476, 88 L ed 239; *Pennsylvania R. Co. v. O'Rourke*, 344 US 334, 97 L ed 367; and see p. 28 below). The statutory provision believed to confer on this Court jurisdiction to review the judgments by writ of certiorari is 28 USC § 1257(3). The petition was presented within the time specified in the Rules of this Court, Rule 22 subd. 3, and 28 USC § 2101(c).

STATUTE INVOLVED

Each case involves § 1 of the Federal Employers' Liability Act, Act of Apr. 22, 1908, c. 149, § 1, 35 Stat. 63, as amended by Act of Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404[6] (45 USC § 51). The statute reads as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Terri-

6. The 1939 Amendment reenacted the first paragraph without change and added the second paragraph.

tories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and child of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled 'An Act relating to the liability of common carriers by railroad to their employees in certain cases' (approved April 22, 1908), as the same has been or may hereafter be amended."

QUESTIONS PRESENTED FOR REVIEW

When an employer, which, as to some of its activities, is a common carrier by railroad engaged in interstate commerce, is manufacturing new equipment (freight cars and car wheels) or constructing new facilities (a "retarder yard") which will be, but have not yet been, placed in rail-

road service, and an employee, employed by it in such manufacturing or new construction, is injured in the course of his employment as the result of negligence of the employer can the employee maintain an action for damages under the Federal Employers' Liability Act, Act of Apr. 22, 1908, c. 149, § 1, 35 Stat. 65, as amended by Act of Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404 (45 USC § 51)?

More precisely, has the 1939 amendment of § 1 of the Federal Employers' Liability Act, which amended that section by adding the second paragraph, obliterated the theretofore established distinction between maintenance and repair which fell within the Act, and manufacturing and new construction to which the Act did not apply?

Has this amendment of 1939 made the **sole** test of applicability of the Act, as amended, that of the second paragraph of § 1 added in 1939 so that the Act is applicable whenever any part of the duties of an employee is "the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce" and has it eliminated the theretofore established **second** test under the **first** and unchanged paragraph (reenacted in 1939 without change) that for the Act to apply the **employer**, with respect to the activity in question, must be acting as a (1) "common carrier" (2) "by railroad" (3) in such commerce?

Is not the specification of employees part of whose duties further interstate commerce narrower than the specification of those whose duties affect interstate commerce even though this must be directly or closely and substantially?

Is not the farthest reach of the amendment limited to employees part of whose duties "directly or closely and substantially affects" interstate commerce and do not these words have a settled meaning which excludes manufactur-

ing and new construction so that in these fields employees still have the benefits of state compensation statutes (even though the employer is without fault) and the protection afforded by state safety regulations?

STATEMENT OF THE CASES

I. The Facts.

A. GILEO, EUFRAZIA AND EELK[7]

To meet the shortage in railroad equipment following World War II Southern Pacific Company (hereinafter referred to as SP) undertook a large program of acquiring new equipment for itself and others. Part of this program was to have outside financing. For part of this program the Board of Directors of SP on August 17, 1950, adopted a resolution for acquisition of 5,000 units of freight train equipment at an estimated cost of $25,797,500.00; 2,925 units for SP and 2,075 for Texas & New Orleans Railroad Company (T&NO). Included in the T&NO units were 1,000 gondola cars (gons) at an estimated cost of $4,300.00 each.[8] (Def. Ex. A; R125, 126, 140)

On September 15, 1950, Southern Pacific Equipment Company (SPEC), by resolution of its Board of Directors, determined to build 2,000 of the 5,000 units, including the 1,000 T&NO gons.[9] (Def. Ex. B; R125, 126, 141). It was

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7. The leading opinion of the Supreme Court of California was in *Gileo v. Southern Pacific Company*. In *Eufrazia* and *Eelk* that court noticed that "the construction project was the same as that involved in *Gileo v. Southern Pac. Co.*,". Accordingly, unless otherwise indicated, we shall state the facts as they appear from the record in *Gileo* and the record references will be to the record in *Gileo*.

8. It is apparent from the lease (R150 ff) which is part of Def. Ex. H, (R127, 150 ff) that this $25,797,500 program was itself only part of a larger program.

9. The estimated cost of the 2,000 units was $9,800,000 (Def. Ex. B. R125, 126, 141).

Other equipment which SPEC undertook to acquire for the same

determined to build these 1,000 gons, nos. T&NO 47,000 to 47,999, both inclusive, at the SP shops at Sacramento, California (Def. Ex. C; R126, 142-144). To this end SPEC purchased all the necessary materials (R41, 128)[10] and entered into a contract with SP under which SP agreed to furnish the necessary shop facilities and labor (Def. Ex. C; R126, 142-144). SPEC also entered into agreements, and agreements were entered into by others, for the fuller carrying out of the program as follows: The cars, when manufactured, would be delivered to The Pennsylvania Company for Banking and Trusts, trustee under an equipment trust, title would pass to [redacted] trustee, the trustee would acquire funds by the sale of equipment trust certificates, use these funds to finance the cars, after junior financing had been done, and then lease the cars to the SP with the privilege of subleasing to T&NO.[11]

At Sacramento, California, SP had general shops i.e., shops which in its organizational set-up were separate from the operating or transportation division. Included in these shops were a passenger car shop and freight car shop No. 9. The freight car department was divided into two departments, New Car Construction and Old Repair Work. (R26, 27, 77, 78, 123-125)

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general program it did not construct but bought from manufacturers. Such a transaction is illustrated by Def. Ex. N (R136, 211-219), SPEC's purchase order P-3071 placed with Pullman-Standard Car Manufacturing Company for 1,600, 40-foot 6-inch freight box cars of 100,000 pounds capacity each. SPEC also built cars for concerns other than SP (R136).

10. Def. Ex. I and J (R128, 129, 201-205) are documents illustrative of the orders placed and method of payment.

11. The details are made to appear by the documents used, Def. Ex. D-H, incl. (R126-128, 145-200). The obvious purpose of lease and sublease was to lend the credit of SP to T&NO.

Programs of constructing new cars at shop No. 9 began July 1, 1950 (R27, 125). For this a new force was employed. (R 27, 28) At the time the plaintiffs were injured about 620 men were employed in this shop. Of these, 365 were carmen and helpers and of these 270 were employed in new car construction. The shop was divided into 2 departments, one doing repair work on equipment in service and the other doing new car construction. Each department was under the supervision of an assistant general foreman. The assistant general foreman in charge of new car building had under him foremen in charge of sections and crews on the assembly line for new car construction. (R26, 27, 30, 31 ff, 35, 40, 133-135) The assembly line consisted of tracks upon which were fixed stations for designated work. The line was so planned that the work at each station would take about 25 minutes. At the end of each such period the whole line moved forward one station. The program called for turning out 18 cars a day. (R31-35, 133-135)

New car construction was the "number one" program of shop No. 9 (R37, 38). The work went on without interruption except from January 8, 1951 to February 12, 1951 when there was a shortage of materials (R33, 34). During this period the new construction forces were assigned to other work to keep them intact. On February 13, 1951, new car construction was resumed with 500 automobile cars. These were followed on May 1 (R 605, 606 [*Eelk*], by the 1,000 T&NO gons. Up to the time of trial of *Gilco* these had been followed by 500 boxcars, 500 gons of one type and 400 gons of another type and another program of 1,500 box cars was in progress. (R34-36, 97, 125)

The work on the assembly line was so organized, and men so assigned to it, that if a man was absent from his place on the line the whole line stopped until that place

was filled (R53, 135). Accordingly, if there were any absences of men on the assembly line their places were temporarily filled by men normally working in the repair department. But men assigned to the assembly line on new car construction were not taken out of it and were not used temporarily for other work.[12] (R35, 37, 38, 40, 134-135, 137, 138)

Gileo, Eufrazia and Eelk were all injured while working on the assembly line in new car construction and on the program of construction of the 1,000 T&NO gons.[13] Gileo was injured July 11, 1951 while working on T&NO 47725 (R1, 4, 123, 124). Eufrazia was injured on July 10, 1951 (R385, 388, 412, 457). Eelk was injured on June 22, 1951 working on car shop No. 506 [T&NO 47505] (R530, 533, 583, 585, 596, 636).

Gileo went to work in the car shop in October, 1941 (R94) and worked in various portions of the shop. On February 12, 1951, he "bid in" as a freight carman welder and from that time on did no work except on new car construction until he was injured. (R95, 96, 97, 115) He first worked on automobile cars and then, from the time the gon program started in April, 1951, he worked without interruption on the gons (R97, 115).

Eufrazia was employed by SP in September 1950 as a

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12. If the men were taken off new car construction and put on repair work this was a permanent assignment. So long as a man was assigned to new car construction, however, he did nothing else. (R 135) Some witnesses were called to indicate that men went from repair to new construction and back to repair. But from their testimony it is clear that these were repairmen called only to fill temporary vacancies on the new car assembly line and that the men assigned to the new car line did no other work until there was a permanent change of assignment. (R35, 40, 51-55, 57, 61-64, 92, 93, 138, 96, 97, 115-117) The men, on the basis of seniority could bid into the shop but their work in the shop was assigned to them. (R28, 29, 38, 39)

13. See footnote 7 above.

helper (R413),[14] was made an up-graded carman in March 1951 (R417, 418) and on June 13, 1951, was assigned to new car construction on the gon program where he worked continuously until the time of his injury (R423, 458; 459). After his assignment to new car construction this was the only work he did (R459, 504).

Eelk was hired as a carman's helper in shop 9 on November 7, 1950.[15] He worked on old equipment until December 1,

14. The general material in the *Eufrazia* record will be found as follows: SPEC builds for others than SP (R492). By resolution it determined to build the 1000 T&NO gons (R478). It did so under shop order 2807 (R459, 519, 520). It made a contract to have SP supply shop and labor (R479). It paid the labor costs to SP (R488, 497, 503) and bought the materials (R486-488, 503). The cars were in part financed under an equipment trust with lease to SP and sublease to T&NO (R482, 483, 485, 490, 484, 495, 491). The shop (R501) and production line are described (R436, 506, 507, 510).

Men, on a seniority basis could bid into car shop 9 (from some other shop in the general shops) but their precise work was assigned to them by the supervisors. The new car construction program was the priority work of the shop. Absence to men from it would hold it up so that men assigned to new car construction were not taken from it temporarily to do other work but men doing repair work were shifted to the production line to fill temporary vacancies and keep the line moving. (R437, 521, 502, 511-513, 521-523)

Eufrazia was assigned to new car construction on June 13, 1951 and that was the only work he did until he was injured on July 10, 1951, working on the program of T&NO gons. (R413, 417, 418, 420, 431, 435, 452, 458, 459, 496, 504, 505)

15. The general material in *Eelk* will be found as follows: SPEC builds cars for service of others than SP (R630, 631). It determined to build the 1000 T&NO gons (R615, 616), contracted with SP to have SP furnish shop and labor, which SP did and SPEC purchased its own materials (R616, 605, 586-589, 591, 604). The cars were in part financed under an equipment trust with lease to SP and sublease to T&NO (R581, 582, 596, 597, 617-626, 629).

The 1000 T&NO gons were a $4,400,000 part of a $10,000,000 program. Work on them, under shop order 2807, started May 1, 1951. (R605, 606, 608, 609)

Car shop 9 is part of the general shops at Sacramento, California. The general shops are a distinct unit apart from the transportation division at Sacramento and reporting directly to the head office of SP (R556, 557, 560, 571, 576-578, 580). The shop builds and repairs cars (R560). It employed about 600 men, 312 on new car construction (R561-563, 578, 590). At the time in question it was building

1950, when he was assigned to new car construction. He remained on new car construction, except when it was shut down January 8-February 12, 1951, on account of shortage of material. When new car construction was resumed on February 13, 1951, he went back to that work and remained at it continuously until he was injured. He did no other work. (R589, 590, 607, 608)

E. ARANDA

For 40 or 50 years SP had operated a wheel foundry at Sacramento, California, for the manufacture of cast iron wheels (R 337, 340). The wheels were manufactured on order from the SP Store Department (R327, 329, 330, 343, 344-347). No wheel was made for any particular car. (R368) The wheels went into stock in the Store Department which kept on hand a 40 to 60 day supply. (R331, 337, 346, 368) The foundry acquired its own raw materials and supplies[15a]

1000 T&NO gons (R567, 579, 594) for SPEC (R569, 580). The program called for 18 cars per day (R571, 584, 585, 590) and these new cars were built on an assembly line (R578, 584, 585, 601, 602) which moved on one "station" every 25 minutes (R584). Absence of a man from the assembly line would stop the line. The new car program was the priority program of the shop. Consequently men assigned to new car construction were not temporarily taken off the line for other work but men normally assigned to other work were used to fill temporary vacancies on the assembly line to keep it moving. (R564, 565, 578, 579, 590, 602, 603, 607, 608)

At the time Eelk was injured he was assigned to new car construction and under this assignment this was the only work he did. (R566, 583; 589-591, 607, 637)

15a. The store department acquired and stocked the material. It was 97% scrap wheels. Some were bought on the outside. It is standard for all manufacturers to use and melt down scrap wheels. It is preferred to use 100% scrap and Griffin does. Outside wheel manufacturers require an old wheel to be exchanged when a new wheel is bought. The reason is that it is difficult to get the proper and standard chemical content from raw material. The scrap wheels have it. In addition it is cheaper to use scrap. About 3% of new material is used because of the shortage of scrap and for control purposes. (R332, 334, 338, 350, 351, 357, 363; 365-367, 369, 370) The SP foundry is subject to the same regulations as other wheel manufacturers (R363).

(R342) but had nothing to do with the ultimate assignment and distribution of the wheels for use (R 337, 338, 368). In 1950, 67,734 wheels were made and in 1951, 65,216 (R338, 339).[15b] The wheels were sold and distributed as follows: to car shop 9, for new car construction by SPEC, 9,266 in 1950 and 27,694 in 1951; to Northwestern Pacific Railroad, 926 in 1950 and 724 in 1951; to small users 16 in 1950 and 10 in 1951. (R339, 341) The remainder went to various departments of SP for use as replacements on its own cars and the cars of other railroads (R339, 340). In 1950 and 1951 SP also bought freight car wheels from independent manufacturers. (R342)[15c]

Aranda, when he was injured on June 12, 1950, had been employed for some 11 years as a molder or molder's helper in the wheel foundry and was working as such making new wheels. (R 352, 355)

C. MORENO

SP had 4 freight train yards near Roseville, California. Two were to the east near Roseville and there were 2 others a considerable distance to the west. Between the 2 yards at the east and the 2 at the west there was open country except for 2 main line tracks and 2 drill tracks. (R262, 263) SP determined to build a new retarder yard in this open area. The project was a large one.[16] To carry it out the following was done:

15b. The foundry turned out about 324 wheels per day and spot tested 2 out of every hundred. If these did not test up all wheels within range of the test were scrapped. (R371, 368)

15c. About 84% of the wheels required by SP come from its own wheel foundry and 16% are purchased from independent manufacturers. SP, if it so elected, could buy all the wheels it required from such manufacturers. It bought 10,882 wheels in 1950 and 10,745 to December 1 in 1951 from outside makers, mostly from Griffin Wheel Co. in Los Angeles. (R324, 325, 327, 342, 343)

16. The total cost was a little over $1,000,000 (R270).

The drill tracks and main line were removed and a new main line was constructed about one-quarter of a mile to the north. (R257, 263) Eighty additional acres of land were acquired (R264). Two power lines, a gas line, a telephone line and a telegraph line were removed (R270, 266). The site was then graded to a new grade, above that of the old main. (R263, 271) The grading was done by an outside contractor and required moving 300,000 cubic yards of earth. (R266, 271) SP then went in with its own forces (R271), a force specially organized for this work, and did the remainder of the work. (R255, 275, 276, 277, 279, 280) This called for the following: The installation of 2 main tracks leading eastward to the top of a "hump", installation of 49 yard tracks to the east with 30 miles of track, 98 switches and 12 retarders, the construction of inspection pits at the point of entry to the new yard, the construction of rooms for doing necessary clerical work, the construction of 4 control towers, the installation of air compressors and connections for operating the retarders and installation of flood lights, new signals and a loud speaker and radio system. (R267-273)

Work on this new project began in April, 1951 (R255, 257). The SP forces went in the latter part of September, 1951 (R 271). The new main line was in operation and removal of the old main line began October 1, 1951 (R257, 258, 263). Moreno was employed on October 2, 1951. He worked only upon construction of this new yard.[17] (R284, 286, 287, 291, 293, 294) He was injured in December, 1951 (R244, 290). The first unit of the new yard, 21 tracks, was not opened and put into service until April 1, 1952, something over 3 months after plaintiff's injury (R258, 275).

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17. He testified that he worked for 15 days on the main line but this was taking out the **old** main line.

"Mr. Colley: Q. Do you know whether or not this main line you referred to was the new main line or an old main line? A. The old main line." (R287)

The retarder yard was new not only as to location and construction but it was new in the manner of operation. The cars being switched and classified, after being shoved eastward up to the top of the hump, then continued by gravity and were handled by power operated switches and retarders, controlled from the control towers, and without the necessity of men riding the cars to control them and without hand throwing of switches in the field. (R 256,-265) There is no evidence that any of the 4 old yards was to be abandoned.

II. Proceedings Below and Stage Therein and Manner in Which the Federal Questions Were Raised[18]

A. GILEO

Gileo's complaint (R1-3) was typical of complaints in actions under the Federal Employers' Liability Act. It alleged that defendant (petitioner here) was a corporation "engaged in the business of a common carrier by railroad in interstate commerce" (par. I), that "plaintiff was employed by defendant in such interstate commerce, and the accident complained of arose while plaintiff and defendant were engaged" in the conduct of interstate commerce (par. II) and that "this action is brought under and by virtue of the provisions of the Federal Employers Liability Act, 45 U.S.C.A. 51, et seq." (par. III) The remainder of the complaint avers the time and place of the accident, charges negligence and avers injury and damage.

By its answer petitioner raised the federal questions. It admitted that it was, "as a part of its business, engaged in the business of a common carrier by railroad in interstate and intrastate commerce" and was qualified as a self-insurer

18. A more detailed statement will be found in the petition for certiorari at pages 14-27.

under the California statutes (par. I.)[18a] that plaintiff was employed in carshop 9 and the time and place of injury. The remaining averments of the complaint, including those that defendant was a common carrier by railroad in interstate commerce and plaintiff was employed by it in such commerce and that the accident arose while the parties were so engaged, are denied. (R3-5)

Agreeably to Cal. CCP § 597 defendant moved "for an order to try separately the issues raised by paragraphs I, II and III of plaintiff's complaint and paragraph I of defendant's answer, namely whether this Court has jurisdiction of this action purportedly maintained under the Federal Employers' Liability Act, 45 USCA § 51, or whether under the Workmen's Compensation Act of the State of California the Industrial Accident Commission has exclusive jurisdiction of the plaintiff's claim."[19] (R5-7) This motion was transferred to be decided at the time of trial by the trial judge (R. 7).

At the beginning of the trial, and in his opening statement, counsel for the defendant, in outlining the matters

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18a. Its certificate of self insurance was proved and is set out in the record. (Def. Ex. M; R136, 216)

19. Unless operation of the California Workmen's Compensation Act (Labor Code, Div. IV, § 3201 ff) is excluded because the Federal Employers' Liability Act applies, the Workmen's Compensation Act provides the exclusive remedy of an injured employee, the tribunal having exclusive jurisdiction to enforce the remedy is the Industrial Accident Commission and courts are without jurisdiction to entertain an action by the injured employee against his employer. (Labor Code, §§ 3600, 3601, 5300, 5301; *Tipton v. Atchison etc. Co.*, 298 US 141, 80 L.ed 1091; *Scott v. I.A.C.*, 9 C2d 315, 70P2d 940; *Scott v. I.A.C.*, 46 A.C. 75, 293 P2d .....; *Esquer v. Teresi*, 105 CA 2d 89, 232 P2d 895; *Freire v. Matson Nav. Co.*, 19 C2d 8, 118 P2d 809; *I.A.C. v. Davis*, 259 US 182, 66 L.ed 888; *B. & M. R. Co. v. Armburg*, 285 U.S. 234, 76 L.ed 729; *Gaulden v. S. P. Co.*, 78 F.Supp. 651 (N.D. Cal.) aff'd on opinion below in 174 F2d 1022 (Circ. 9); *Hines v. I.A.C.*, 184 Cal. 1, 192 Pac. 859.) In *Raymond v. Chicago etc Co.*, 243 US 43, 44, 61 L.ed 583, 585 the issue was raised by pleading want of jurisdiction. See p. 28 below.

to which the evidence would be directed, again raised the question." (R20-24)

The reserved question of jurisdiction was not separately tried. Evidence on all the issues was taken. The Court indicated that it would rule, as matter of law, that the Federal Employers' Liability Act applied and would so instruct the jury. It was then stipulated that the issue of negligence should be resolved in favor of the plaintiff and that plaintiff, if entitled to recover, should recover $7,000 plus interest. The court ruled as a matter of law that the Federal Employers' Liability Act applied. Accordingly, it was stipulated that there was no issue for the jury and the jury was dismissed. Thereupon, as a matter of law, the Court ordered judgment in favor of plaintiff, and judgment for plaintiff was entered.[21] (R 10-12, 120-122, 139).

Defendant (petitioner here) appealed to the District Court of Appeal, State of California, First Appellate District (R13-15). The only questions there presented were those presented here. All other matters had been disposed of by stipulation. (R120-122)

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20. See the petition for certiorari pp. 15 and 16 where this portion of the opening statement is quoted.

21. The judgment (R10-12) recites fully how the issues were disposed of and the Court's determination that "resolving all conflicts in favor of defendant and drawing all permissible inferences of fact in favor of defendant, as matter of law, at the time and on the occasion when plaintiff was injured defendant, with respect to activities on its part connected with said injury, was a common carrier by railroad engaged in interstate commerce and plaintiff at said time and on said occasion was employed by it and as such employee part of his duties was the furtherance of interstate or foreign commerce and directly or closely and substantially affected such commerce, the Federal Employers' Liability Act (45 U.S.C. § 51 ff) applied" there is no issue for the jury and plaintiff is entitled to judgment. The pertinent parts of the judgment are set out in full in the petition for certiorari, pp. 16-18 and it is set out in full in the appendix to the petition pp. 1-4.

On April 28, 1954 the District Court of Appeal rendered its opinion reversing the judgment (R235-241; 124 ACA 951 and 269 P2d 150).[22] Its conclusion was that the FELA did not apply and "that SP was in no different position than a manufacturer, not engaged in railroading, which was manufacturing railroad cars to be delivered to any purchaser."

Upon application of the respondent Gileo the Supreme Court of California, on June 23, 1954, granted a hearing and transferred the cause into the Supreme Court for determination (R228, 229). On April 29, 1955 it affirmed the judgment of the trial court. (R229-233, 44 C2d 539, 282 P2d 872).[23]

B. MORENO, ARANDA, EUFRAZIA AND EELK[24]

The complaints in *Moreno* (R243-245), *Aranda* (R303, 304, 307-310), *Eufrazia* (R384-388) and *Eelk* (R529-533), while not exactly alike are substantially like the complaint in *Gileo*. They identify the defendant as a common carrier by railroad engaged in interstate commerce, the plaintiff as an employee of defendant employed in such commerce and injured while so employed, charge the defendant with negligence and allege damage. In each case the federal question was raised in the answer by appropriate denials of the averments of the activity in which the parties were engaged and by affirmatively setting up that the court had no jurisdiction of the subject matter of the action,[25] or averring the

22. Set out in the appendix to the petition for certiorari pp. 5-12.

23. Set out in the appendix to the petition for certiorari pp. 13-17.

24. The detail is set out in the petition for certiorari as follows: *Moreno* pp. 19-21, *Aranda* pp. 21-24, *Eufrazia* pp. 24, 25; *Eelk* pp. 25-27.

25. See footnote 19 above and p. 28 below.

precise work plaintiff was doing. (*Moreno*, R246-248; *Aranda*, R304-307, 310, 311;[26] *Eufrazia*, R388-391; *Eelk*, R533-535[26]).

In *Aranda* (R316, 317) and *Eelk* (R535) by consent and in *Moreno* (R300) and *Eufrazia* (R391-393) by order made on motion, agreeably to Calif. CCP § 597, the special issue of jurisdiction, i. e. whether the Federal Employers' Liability Act applied, was tried separately to the court, the court sitting without a jury.

In *Moreno* (R301) and *Aranda* (R382)[27] the court ruled that it had jurisdiction and that the Act applied but made no findings of fact, the cases then proceeded to trial on the other issues and the plaintiffs had verdicts and judgments. In *Moreno*, on motion, judgment notwithstanding the verdict was entered for defendant on the ground that, as matter of law, there was no evidence of negligence (R249, 251).[28] In *Eufrazia* (R393-402)[29] and *Eelk* (R535-546)[30] the court concluded that the Act did not apply and that plaintiff's sole remedy was under the California Workmen's Compensation Act (Labor Code § 3201 ff). On findings of fact and conclusions (*Eufrazia* R403, 404; *Eelk* R546-548) judgments were entered for defendant (R405, 406, 548).

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26. In *Aranda* the averments of the complaint were denied and it was averred that plaintiff was employed "exclusively in the construction of new railroad car wheels, and was not employed in interstate commerce." (R305) In *Eelk* it was affirmatively set up that plaintiff was engaged in new car construction (R533).

27. The trial court filed an opinion (R378 ff) set out in the appendix to the petition for certiorari pp. 28-33.

28. The opinion is set out in the appendix to the petition for certiorari pp. 20, 21.

29. The opinion is set out in the appendix to the petition for certiorari pp. 40-50.

30. The opinion which simply follows, and sets out, the trial court's opinion in *Eufrazia* is set out in the appendix to the petition for certiorari pp. 57-70.

In *Moreno* (R251-253), *Eufrazia* (R406-408) and *Eelk* (R549, 550) the plaintiffs, and in *Aranda* (R313-316) the defendant appealed to the California District Court of Appeal, Third Appellate District. The cases were argued there together but, before decision there, were transferred to the California Supreme Court. (R296, 302, 373, 383, 525, 528, 639, 642) They were decided in the Supreme Court on April 29, 1955 with *Gileo*. The judgment in *Aranda* was affirmed and the judgments in the other three cases were reversed (R299, 377, 527, 641).

III. Grounds of the Decisions Below

The short of the holdings of the Supreme Court of California is that where an employee of an employer which, as to some of its activities, is a common carrier by railroad in interstate commerce, is injured in the course of his work and claims that the injury resulted from the negligence of his employer the **sole**[31] test of application of the FELA is whether the **employee** falls within the extended area of application of the act as to **employees** resulting from the 1939 amendment of § 1 of the act which, re-enacting the first paragraph, added a new and second paragraph. The holdings are that it is immaterial whether the **employer**, as to the activity in question, is acting as a **common carrier** or a **railroad** (the test under the first and unchanged paragraph of § 1) if in a general sense it is a railroad (but *cf. contra Raymond*, p. 60 below; see note 61 below); that the only question is whether any part of the duties of the employee "shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce". The holdings are that the theretofore estab-

31. All emphasis by boldface, whether in quoted matter or elsewhere, is ours.

lished distinction between new construction (where the act did **not** apply) and repair and maintenance of existing facilities already devoted to common carriage by railroad in interstate commerce (where the act did apply) has been abolished and that the manufacture of car wheels and new cars, and the construction of a wholly new yard, "further interstate commerce or affect it * * * 'directly or closely and substantially'," and that this is all that need appear.

The leading opinion of the Supreme Court of California is in *Gileo* followed, without discussion, in *Eufrazia* (R526) and *Eelk* (R640). In *Gileo,* after stating the facts and quoting the statute, the court said:

> "It is the position of defendant that it is not liable under the act unless it can be said that in manufacturing railroad cars it was engaged in intersate commerce.[32] This argument overlooks the effect of the second paragraph of the section quoted above, which was added by amendment in 1939. Under that paragraph, plaintiff is considered to have been employed by defendant in interstate commerce and is entitled to the benefits of the act if his duties were in the furtherance of such commerce or affected it in any way 'directly or closely and substantially.' (*Erickson v. Southern Pac. Co.*, 39 Cal.2d 374, 378 [246 P.2d 642])" (R231)

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32. With deference, the position of the defendant, petitioner here, was not and is not so restricted. The defendant rested its position (in part) upon the opening provision of § 1 of the FELA, reenacted in 1939 without change, which states that the liability being provided for is that of "every **common carrier** by **railroad while** engaging in commerce between any of the several states * * *." The defendant's position was that with respect to the activity in question it must not only be shown that the employer was "engaging in commerce between any of the several states" but also that in respect of such activity it was also a (1) "common carrier", (2) "by railroad". It is also petitioner's position that the men do not fall with the classes of employees specified in the second paragraph of § 1.

The court then said that the 1939 amendment was designed to include employees previously excluded and to eliminate confusion and hardship; that to this end doubt should be resolved in favor of application of the act. (R231) A number of cases were then referred to and it was said that the duties of Gileo "were at least as intimately connected with interstate commerce" as in the cases cited.[33] (R 231) The court continued:

> "Before the broad language now appearing in the act was added by the amendment in 1939, some decisions indicated that there was a distinction between an employee repairing equipment already operating in interstate commerce and one constructing equipment later to be used in that commerce, and it was held that the latter did not have federal coverage. (*New York Central R. R. Co. v. White*, 243 U.S. 188, 192 [37 S.Ct. 247, 61 L.Ed. 667]; *Raymond v. Chicago, M. & St. P. R. Co.*, 243 U.S. 43, 45 [37 S.Ct. 268, 61 L.Ed. 583]; see *Pedersen v. Delaware, L. & W. R. Co.*, 229 U.S. 146, 152 [33 S.Ct. 648, 57 L.Ed. 1125].) The only case decided after 1939, however, in which such a distinction was applied is *Moser v. Union Pac. R. Co.*, (1944) 65 Idaho 479 [147 P.2d 336, 153 A.L.R. 341], where a divided court held that an employee working on the construction of four miles of new track was not covered by the act. We cannot agree with the reasoning of the majority opinion in the *Moser case*. Under the language added by the amendment, an employee of a common carrier by railroad is entitled to the benefits of the act if his duties further intertsate commerce or affect it in any way 'directly or closely and substantially,' regardless of whether the work which he is doing may be classified as new construction or repairs. The cars on which plaintiff was working were intended to be used in interstate commerce, and it is clear that the construction of the cars furthered such commerce." (R232)

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33. The cases cited are discussed below pp. 101-104.

The opinion in *Aranda* (R374-377) really adds nothing. The procedure of the case is briefly stated and there is a brief statement of the facts. The court then said that "Federal coverage has been extended to employees injured while performing duties similar to those involved here" (citing three of the cases cited in *Gileo*, with a brief statement of their facts). (R375) The remainder of the opinion on this point is:

> "In the present case, some of the wheels which plaintiff molded were to be used in repairing railroad cars moving in interstate commerce, and the importance of his work to that commerce was not reduced by the fact that the wheels were temporarily stored before being used. We are of the opinion that plaintiff's duties furthered interstate commerce. He is, therefore, considered to have been employed by defendant in interstate commerce and is entitled to the benefits of the act. (*Gileo v. Southern Pac. Co., ante*)." (R375)

The opinion in *Moreno* (R297-299) after a very brief statement of the proceedings and facts and reference to two cases disposes of the case on the basis of *Gileo*:

> "In the present case, the construction was new, but the yard was intended as a substitute for the existing method of switching and classifying railroad cars. The proper designation of the work, however, is not important since the applicability of the act depends on whether an employee's duties further interstate commerce or affect it 'in any way directly or closely and substantially.' (*Gileo v. Southern Pac. Co.*, ante; 45 U.S.C.A. § 51.) We are of the view that, under the circumstances involved here, plaintiff's duties furthered interstate commerce. He is, therefore, considered to have been employed by defendant in that commerce and is entitled to the benefits of the act. (*Gileo v. Southern Pac. Co.*, ante)." (R298)

SUMMARY OF ARGUMENT

If the cases do not fall under the Federal Employers' Liability Act (p. 5 above) the California Labor Code § 3201 ff applies the courts below were without jurisdiction as matter of California law and the judgments of the Supreme Court of California must be reversed. (Pp. 28, 29 below.)

The situation out of which the FELA, as amended in 1939, emerged is a frame of reference in which it must be viewed and construed (pp. 30-33 below). The amendment must be construed in the light of the history of the Act which it amends, experience under that Act and the settled construction of that Act.

Important to the Act of 1908, pointing up its self-restraint, is the historical fact that an earlier congressional attempt in the field was held beyond the power of Congress under the commerce clause (pp. 33-37 below). Responsive to that holding the FELA of 1908 was carefully limited (to cure the infirmities of the Act of 1906) to (1) employers who were "common carriers by railroad while engaging" in interstate commerce and (2) employees "while * * * employed by such carrier in such commerce". (P. 37 ff)

Application of the statute presents questions not of constitutional power but of statutory construction. (Pp. 37-39 below.) For the Act of 1908 to apply **both** the employer and the employee must be of the sort described by § 1 of the Act (pp. 39-41 below). The employer must be acting as a **common carrier** and carrying by **railroad** (pp. 41-45 below), the injured man must have to that activity the conventional relation of employee (pp. 45-47 below) and both must be engaged in interstate commerce at the moment of injury (pp. 47-49 below). It results that a man might be in and out of the Act several times on the same shift. (Pp. 48, 49 below.)

In applying the limitation that the parties must be en-

gaged in interstate commerce, having in mind that the business of a railroad is providing transportation, and that the Act was not designed to cover all employees of a railroad however remote their work was from the heart of that business, this Court defined interstate commerce, under the Act of 1908, as interstate **transportation** or work so closely related to it as to be practically a part of it (see pp. 49-52 below). Applying this test it was settled that the Act applied to crews when moving **interstate** vehicles but not to those not so engaged (p. 52 below); to servicing interstate power and cars but not rolling equipment withdrawn from service for heavy repairs or unassigned (p. 55 below); to keeping the line clear for interstate movements and otherwise directly facilitating them (p. 56 below); to repair and maintenance of a line in use in interstate commerce but not to new construction (p. 57 below); and **not** to acquiring or storing supplies (p. 60 below) or work with equipment or structures which do not use, or are not part of, the line itself, although these cases were borderline and this Court at one time took a contrary view (p. 50 ff, 61 below).

A latitudinarian construction of the Act is no unmixed blessing. It may well serve to deprive an injured man of any relief and of relief to which he would be entitled (as under state compensation acts) if it did not apply. (P. 61 below.)

In this situation Congress adopted the amendment of 1939 with the limited objectives of elimination of the moment of injury rule (specifically mentioning in the Senate report on the bill switchmen and rolling equipment maintenance men) and bringing under the Act the borderline cases (pp. 63-77 below). The amendment reenacted § 1, with the construction put upon it by this Court, without change except that an added clause re-defined the word "employee". The defini-

tions of employers covered (see § 1), or of interstate commerce (by decision,—see below) were not tampered with. (Pp. 69-72 below.) There is no suggestion that local new construction or manufacturing were brought under the Act or that it was to apply to an employer who was not, as to the business in hand, acting as a railroad or a carrier (pp. 69-72 below).

The change in the amendment during the course of passage, by eliminating a proposed change and by inserting the limiting words "directly or closely and substantially" (p. 63 below) and the Committee report on the bill (p. 65 below) point out the modest objectives. The form of the amendment of 1939 confirms this (p. 67 below). The restrictive language is not of new and uncertain meaning and excludes manufacturing and new construction (p. 72 ff below).

The conclusion urged is fortified by the consideration that to apply the FELA here will not only displace the state compensation act but will, in effect, deprive men in manufacturing and new construction of a large part at least of the benefit of a comprehensive system of state safety regulation without substituting anything for it (p. 73, 84 ff below). In analogous situations this Court has held that activity like that here involved had no direct relation to navigation and commerce and permitted the men the benefits of the state scheme (p. 92 ff below).

Lower federal court and state court decisions have not extended the FELA as amended as far as would the decisions now here for review (p. 94 ff below).

Mitchell v. Vollmer & Co., under a different statute, provides its own authoritative and controlling distinction from cases under the FELA and in any event is no authority for the proposition that petitioner here was acting as a common carrier or a railroad within the requirements of the unamended part of § 1 of the FELA (p. 104 below).

ARGUMENT

I. The Trial Courts Lacked Jurisdiction Unless The Federal Employer's Liability Act Applied

Each respondent, at the time he was injured, was an employee of Southern Pacific Company. The injury was suffered in California. The injury arose in the course of and out of the employment,—the men were hurt on the job. In such circumstances, if the law of California alone be looked to, the sole remedies are under the California Workmen's Compensation Act (Lab. Cod. § 3201 ff) and the California Industrial Accident Commission alone has jurisdiction to determine whether the men are entitled to any benefits and, if they are, what those benefits should be.

Scott v. Ind. Acc. Com., 46 A.C. 75 293 P 2d .....;

Hines v. Ind. Acc. Com., 184 Cal. 1, 192 P 859;

Scott v. Ind. Acc. Com., 9 C2d 315, 70 P2d 940 (disapproving earlier California cases);[34]

So. Pac. Co. v. Ind. Acc. Com., 19 C2d 271, 120 P2d 880 and companion cases in 19 C2d;

Ind. Acc. Com. v. Davis, 259 US 182, 66 L ed 888;[35]

Boston & M. R. v. Armburg, 285 US 234, 76 L ed 729;

Tipton v. Atchison etc. Ry. Co., 298 US 141, 80 L ed 1091;[36]

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34. See also note 19, p. 17 above.

35. The California Industrial Accident Commission made an award. The California District Court of Appeal reversed upon the ground that operation of the California statute was excluded because the FELA applied. This court reversed the California District Court of Appeal.

36. A switchman sued for injuries alleged to have resulted from a defective coupler used in violation of the Safety Acts. The complaint did not allege that he was engaged in interstate commerce. This Court held that the Safety Acts did not themselves create a cause of action for injury resulting from their violation and that where the FELA did not apply the law of the state must be looked to to determine what remedy the injured employee had; that where

Gaulden v. So. Pac. Co., 78 F. Supp. 651 (N.D. Cal.), aff'd for the reasons and on the grounds stated by the trial court, 174 F2d 1022, (Cir. 9).

But if the Federal Employer's Liability Act (45 USC § 51 ff—see p. 5 above) applies it occupies the field, supersedes the state law and there is no room for operation of the state statute.

Mondou v. N. Y. etc. R. Co., 223 US 1, 53, 56 L ed 327, 347;

St. Louis etc. Ry. Co. v. Seale, 229 US 156, 158, 57 L ed 1129, 1133;

No. Car. R. Co. v. Zachary, 232 US 248, 256, 58 L ed 591, 594;

Shanks v. Delaware etc. R. Co., 239 US 556, 60 L ed 436;

N. Y. C. R. Co. v. Winfield, 244 US 147, 61 L ed 1045;

N. Y. C. R. Co. v. Porter, 249 US 168, 63 L ed 536;

So. Pac. Co. v. Ind. Acc. Com., 19 C2d 271, 120 P2d 880 and companion cases in 19 C2d.

If the state statute applies the court below had no jurisdiction. It had jurisdiction only if the FELA, giving the employee a right of action, is controlling.

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as in California, the common law had been superseded by a Workman's Compensation statute the sole remedy provided was under that statute and the action could not be maintained. Some doubt had existed as to the law of California because of 2 decisions in the District Court of Appeal but the question was sufficiently doubtful to permit the Circuit Court of Appeals for the Ninth Circuit to make its own determination of the law of California. The Supreme Court of California then brought the law of California into harmony with the *Tipton* holding in the *Scott Case*, 9 C2d 315, cited above in the body, and disapproved the 2 earlier California cases which had created the doubt.

II. The FELA Must be Viewed In its Historical Setting

Beginning in 1906, before any compensation statutes had been adopted in this country,[37] Congress undertook a course of legislation which had for its target what, in the circumstances of railroading, were harsh and anachronic defenses to an employee's claim for compensation for on-duty injury.[38] One program, the first undertaken,[39] culminated in the statute with which we are concerned, the Federal Employers' Liability Act of 1908 as amended (45 USC [illegible]1 ff). The precise targets were the common-law defenses of the fellow servant rule, contributory negligence and assumption

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37. Workmen's compensation legislation began in Germany in 1884. There was such legislation in England by 1897. The first compensation statute in this country was for certain government employees, the Act of May 20, 1908, 35 Stat. 556. This was shortly followed by state compensation legislation. The first state act was that of Montana of 1909.

Up to 1906 compensation of railroad employees for injuries, like other employees, was a matter of state law. The various states, allowing recovery for injuries caused by negligence, had, from time to time, adopted statutes modifying the common-law defenses of negligence of a fellow-servant, contributory negligence and assumption of risks. There was no uniformity in this legislation. (*Mondou v. N. Y. etc. R. Co.*, 223 US 1, 51, 54, 56 Led 327, 346, 348; *South Buffalo Ry. Co. v. Ahern*, 344 US 367, 371, 97 Led 395, 401.)

38. See *N. Y. C. R. Co. v. White*, 243 US 188, 197 ff, 61 Led 667, 672 ff.

39. There had been earlier legislation dealing with the subject of employee safety, the so-called Safety Acts (45 USC § 1 ff) and there was later legislation on this subject, the Boiler Inspection Act, etc. (45 USC § 17 ff). But these Acts had to do with the duty of the employer and not with the defenses he might urge except as the Act of Mar. 2, 1893, c. 196 § 8 (27 Stat. 531; 45 USC § 7) abolished the defense of assumption of risk where that statute had been violated.

Later statutes of general application, are the Jones Act of Mar. 4, 1915, c. 153, § 20, 38 Stat. 1185; June 5, 1920, c. 250, § 33, 41 Stat. 1007 (46 USC § 688) applying to seamen and the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, c. 509, 44 Stat. 1424 applying as its name suggests.

of risk.[40] In the cases now before the court we are not concerned with the measures taken. We are concerned with the area of impact of the effort. It has a background of Constitutional limitations.

"The federal union is a government of delegated powers. It has only such as are expressly conferred upon it and such as are reasonably to be implied from those granted." (*United States v. Butler*, 297 US 1, 63, 80 L ed 477, 487; *United States v. Darby*, 312 US 100, 85 L ed 609;[41] *Carter v. Carter Coal Co.*, 298 US 238, 291, 80 L ed 1160, 1178.) For this railroad legislation Congress used its power under the

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40. The Acts of 1906, and 1908 and the amendments to the latter in 1910 and 1939 had other provisions as to the time within which action must be brought, jurisdiction of state courts, non-removability of actions from state to federal courts, remedies in the case of death, restrictions on the contracts which could be made with respect to injuries and provision for securing information. But the main thrust of the legislation was at the common-law defenses. As to these defenses:

The Act of 1906 undertook to abolish the fellow servant doctrine and to substitute for the common-law defense of contributory negligence the comparative negligence rule where the contributory negligence was slight and the negligence of the employer was gross in comparison.

The Act of 1908 abolished the fellow servant rule, substituted for the rule that contributory negligence was a bar the comparative negligence rule in all cases except where there was a violation of the safety appliance acts and provided that where there was a breach of the safety acts contributory negligence and assumption of risk were not defenses. In other cases assumption of risk was a defense. The 1939 amendment abolished the defense of assumption of risk where injury resulted from the employer's negligence and obliterated "every vestige of the doctrine of assumption of risk." (*Tiller v. Atl. C. L. R. Co.*, 318 US 54, 87 L ed 610.)

41. The question discussed in *Darby* was the power of Congress under the commerce clause to regulate local activities which reflected themselves in interstate commerce. In the cases at bar we are concerned with no such question but only with the question of statutory construction and determination of the extent to which Congress elected to exercise its power under the commerce clause. See below, pp. 37, 38. Cf. *Walling v. Jacksonville Paper Co.*, 317 US 564, 570, 87 L ed 460, 467; *McLeod v. Threlkeld*, 319 US 491, 493, 87 L ed 1538, 1541; *10 East 40th St. Bldg. Co.*, 325 US 578, 89 L ed 1806.

commerce clause. That its exercise of the power would not offend constitutional limitations it wrote into the act of 1908 an express limitations on the Act's application. By amendment in 1939 one of the limitations was relaxed. The question here is the effect of the 1939 amendment. The question is illuminated by 50 years of history.

Neither the Act of 1908 nor the 1939 amendment was enacted in a vacuum. Both, and more particularly the amendment of 1939, had legislative and judicial antecedents.[42] This Court is "not limited to the lifeless words of the statute and formalistic cannons of construction in" its "search for the intent of Congress. The Act" and the amendment were "the product of a period, and, 'courts, in construing a statute, may with propriety recur to the history of the times when it was passed.'" (*Gt. Northern R. Co. v. United States*, 315 US 262, 273, 86 L ed 836, 841.)

> "The purpose of Congress is a dominant factor in determining meaning. **There is no better key to a difficult problem of statutory construction than the law from which the challenged statute emerged.** Remedial laws are to be interpreted in the light of previous experience and prior enactments. Nor, where doubt exists, should we disregard informed Congressional discussion." (*United States v. C. I. O.*, 335 US 106, 112, 92 L ed 1849, 1856.)

The legislative and judicial background of the 1939 amendment of the FELA is of peculiar significance because of the form of the amendment, a verbatim reenactment of

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42. "The statute cannot be divorced from the circumstances existing at the time it was passed, and from the evil which Congress sought to correct and prevent." (*United States v. Champlin Ref. Co.*, 341 US 290, 297, 95 L ed 949, 955. Cf *N. Y. Trust Co. v. Eisner*, 256 US 345, 349, 65 L ed 963, 983 ("Upon this point a page of history is worth a volume of logic."); *Texas etc. Co. v. I. C. C.*, 162 US 197, 218, 40 L ed 940, 947.)

the pertinent section of the Act (§ 1, 45 USC § 51), as it then read, and the addition of a paragraph merely redefining the word "employee" (see p. 69 below).

III. The FELA Has a Background of Adjudicated Constitutional Limitations on its Coverage.

On June 11, 1906, the first Employers' Liability Act[43] (34 Stat. 232, c. 3073, U.S. Comp. Stat. Supp. 1907, p. 891) was adopted. This Act made "every common carrier engaged in trade[44] or commerce" in the District of Columbia, in the Territories and in interstate trade or commerce "liable to any[44] of its employees, or, in the case of his death, to his personal representative * * * for all damage which may result from the negligence of any of its officers, agents, or employees, or by reason of any defect or insufficiency due to its negligence in its cars" and other equipment and facilities.[45] It was not limited to railroads.

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43. The Act was entitled: "An Act Relating to Liability of Common Carriers in the District of Columbia and Territories, and Common Carriers Engaged in Commerce Between the States and Between the States and Foreign Nations to Their Employees."

44. The emphasis is for contrast with the later Act of 1908.

45. The full text of the first section of the Act, providing for its coverage, is: "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every common carrier engaged in trade or commerce in the District of Columbia, or in any territory of the United States, or between the several states, or between any territory and another, or between any territory or territories and any state or states, or the District of Columbia, or with foreign nations, or between the District of Columbia and any state or states or foreign nations, shall be liable to any of its employees, or, in the case of his death, to his personal representative for the benefit of his widow and children, if any; if none, then for his parents; if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents, or employees, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways, or works."

On January 6, 1908, this Court held this statute unconstitutional as applied to injury or death as the result of an accident in any of the States. (*Howard v. Ill. C. R. Co.* and *Brooks v. So. Pac. Co.*, 207 US 463, 52 L ed 297) The ground was that the coverage of the statute was too broad and beyond the power of Congress under the commerce clause.[46] The argument that the Act was beyond the competence of Congress because it regulated the relation of master and servant was rejected. But the argument that the statute was unconstitutional because the area of coverage was too broad and it undertook to regulate that relationship in activities which were not interstate commerce was sustained.

This Court first noticed the coverage of the Act as to persons;

> "From the 1st Section it is certain that the Act extends to **every** individual or corporation who may engage in interstate commerce **as a common carrier.**[47] Its all-embracing words leave no room for any other conclusion. It may include, for example, steam rail-

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46. Congress has plenary power (subject to the limitation of due process) to legislate for the District of Columbia and the Territories. It need not look to the commerce clause. The provisions of the Act of 1906, as applied to the District of Columbia and the Territories, were severable and valid. (*El Paso etc. Co. v. Gutierrez*, 215 US 87, 54 L.ed 106; *Santa Fe etc. Co. v. Friday*, 232 US 694, 58 L.ed 802; *Washington etc. Co. v. Downey*, 236 US 190, 59 L.ed 533.) That this would be the result when the question was raised was pointed out in *Howard* (207 US at p. 500). Accordingly, it is in force in the District of Columbia and the Territories except as it has been superseded by the Federal Employers' Liability Act of 1908 or other statute (*Phila. etc. R. Co. v. Schubert*, 224 US 603, 56 L.ed 911; *So. Ry. Co. v. Taylor*, 16 F2d 517 (Circ. Dist. Col.), cert. den. 273 US 767, 71 L.ed 882).

47. *Ill. C. R. Co. v. Behrens*, 233 US 473, 477, 58 L.ed 1051, 1054 also noticed that the Act of 1906 "attempted to regulate the liability of **every** carrier in interstate commerce, **whether by railroad or otherwise**". The Act of 1908 made a decided, and for the case at bar a most significant, change by limiting the act to employers who were common carriers **by railroad**.

roads, telegraph lines, telephone lines, the express business, vessels of every kind, whether steam or sail, ferrys, bridges, wagon lines, carriages, trolley lines, etc. Now, the rule which the statute establishes for the purpose of determining whether all the subjects to which it relates are to be controlled by its provisions is that anyone who conducts such business be a 'common carrier, engaged in trade or commerce in the District of Columbia, or in any territory of the United States, or between the several states,' etc."

It was held that it followed that the Act applied to all of the activities of the persons described and did not confine itself "to the interstate commerce business which may be done by such persons."

"Stated in another form, the statute is addressed to the individuals or corporations who are **engaged** in interstate commerce, and is **not confined solely to regulating the interstate commerce business which such persons may do**,—that is, it regulates the persons because they engage in interstate commerce, and does not alone regulate the business of interstate commerce.

"And the conclusion thus stated, which flows from the text of the act concerning the individuals or corporations to which it is made to apply, is further demonstrated by a consideration of the **text of the statute defining the servants to whom it relates.**

"Thus, the liability of a common carrier is declared to be in favor of **'any** of its employees.' As the word 'any' is unqualified, it follows that liability to the servant is coextensive with the business done by the employers whom the statute embraces; that is, it is in favor of **any** of the employees of **all** carriers who engage in interstate commerce. * * *

"The act, then, being addressed to **all** common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employees, **without qualification or restriction as to the business**

in which the carriers or their employees may be engaged at the time of the injury, of necessity includes subjects wholly outside of the power of Congress to regulate commerce. Without stopping to consider the numerous instances where, although a common carrier is engaged in interstate commerce, such carrier may, in the nature of things, also transact business not interstate commerce, although such local business may indirectly be related to interstate commerce, a few illustrations showing the operation of the statute as to **matters wholly independent of interstate commerce** will serve to make clear the extent of the power which is exerted by the statute. Take a railroad engaged in interstate commerce, having a purely local branch operated wholly within a state. Take again the same road having shops for repairs, **and, it may be, for construction work,** as well as a large accounting and clerical force, and having, it may be, storage elevators and warehouses, **not to suggest, besides, the possibility of its being engaged in other independent enterprises.** * * *

"As the act thus includes many subjects wholly beyond the power to regulate commerce, and depends for its sanction upon that authority, it results that the act is repugnant to the Constitution, and cannot be enforced unless there be merit in the propositions advanced to show that the statute may be saved."

We have quoted *Howard* at length because it is not alone the holding which illuminates the Act of 1908 but, as well, the construction put upon the Act of 1906. The statement of the scope of its coverage shows with what care and with what deliberately limiting purpose Congress used the restrictive language of the Act of 1908[47a] (obviously, for one restriction; enacting the construction suggested in the dis-

47a. Cf. *Jensen*, note 50 below.

sent of Mr. Justice Holmes[48]) and, indeed, with what care this Court spoke in discussing the scope of the Act of 1908.

Any future question arising from the construction adopted in *Howard* Congress removed when it enacted the statute of 1908. The holding of *Howard*, on the constitutional question (assuming the correctness of the majority's construction of the statute) has never been questioned. But even if now the case would not be followed that is beside the point in determining the meaning of the language which Congress used in 1908 for in that regard the only material matter is the position of this Court at that time. In an analogous situation *Federal Power Com'n v. East Ohio Gas Co.*, 338 US 464, 472, 94 L ed 268, 277 said:

> "But *prior* constitutional decisions, not what we have since decided or would decide today, form the measure of a gap which Congress intended to close by this Act."[49]

IV. Limited Coverage of the Act of 1908

Congress promptly enacted a second Employers' Liability Act (35 Stat. 65; see p. 5 above) effective April 22, 1908, limited to regulation of railroading.[49a] Sensitive to *Howard*, p. 34 above, the construction of the Act of 1906 upon which the holding of that case was bottomed and the consequent infirmities of that Act, Congress carefully restricted the coverage of the Act of 1908[50] to matter well within the limits

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48. The dissents went upon the ground the statute could be construed to apply only to the interstate business of common carriers and the employees engaged in that business at the time of injury. Mr. Justice Holmes (207 US at 541) though the words " 'every common carrier engaged in trade or commerce' could be construed to mean 'while engaged in trade or commerce' ". Compare the language used in the Act of 1908, p. 5 above and p. 47 below.

49. Emphasis is that of the Court.

49a. Cf. note 47 above.

50. *So. Pac. Co. v. Jensen*, 244 US 205, 212, 61 L ed 1086, 1097 noticed the holding of the *Howard* Case and in immediate sequence said: "The later act is carefully limited * * *." See other language quoted in note 59 below.

of its power by expressed restrictions in § 1, the controlling provision. (*Ill. Cent. R. Co. v. Behrens*, 233 US 473, 477, 58 L ed 1051, 1054.) That section, so far as we are now concerned with it, provided:

> "Every common carrier **by railroad while engaging** in commerce between any of the several states * * * shall be liable in damages to any person suffering injury **while he is employed** by **such** carrier in **such** commerce * * *"

The words in bold face are the new limiting words. They were held to save the statute when under attack on constitutional grounds in the Second Employers' Liability Act Cases, *Mondou v. New York etc. R. Co., etc.*, 223 US 1, 56 L ed 327.

In determining the coverage of the Act the question then "is not the constitutional power of Congress to extend the application of the Employers' Liability Act to operations less direct and immediate in their relation to interstate or foreign commerce. The question here is the meaning of the statute which it has chosen to adopt." (*Carey v. New York C. R. Co.*, 250 NY 345, 165 NE 805, 808 col. 2. Cf. cases in note 41 above. See pp. 77 ff; 83 below.)

The restrictions of the Act of 1908 are two. (1) The statute is restricted as to the persons to whom it applies,—it is restricted to an employer who is a "common carrier **by railroad**" (cf. note 47 above) and to its employee "while he is employed by **such** carrier". (2) It is restricted as to the activities of the persons who fall within the act,—it is restricted to such employer "**while engaging** in commerce between any of the states" and to the employee "**while** he is employed by such carrier **in such commerce.**"[51] We do not

51. Compare what Mr. Justice Holmes had said of possible construction of the Act of 1906, note 48 above.

suggest that the restriction as to activity is not also a restriction as to persons,—it is,—but we think that it leads to clarity in analysis, at least it helps our thinking, to separate the restrictions (a) as to persons and (b) as to activity.

A. THE LIMITATIONS APPLY TO BOTH EMPLOYER AND EMPLOYEE

Before taking up separately the meaning and effect of these limitations there should be considered decisions of this Court which apply to both. They established that before the Act can apply it must be shown that **both** the employee **and** the employer,—both the plaintiff and the defendant,—meet the prescribed tests. It is not enough that the employee is engaged in interstate commerce. He must be an employee of the sort of employer described by the Act.[51a] The defendant must be that sort of employer upon whom the Act fastens the responsibilities for which it provides; and doing the things described. Effect must be given to the words **"common carrier by railroad**[51b] **while** engaging in commerce between any of the several states" under the ordinary "rule that **all** words of the statute are to be taken into account and given effect if that can be done consistently with the plainly disclosed legislative intent." (*McDonald v. Thompson*, 305 US 263, 266, 83 L ed 164, 166; *United States v. Lexington etc. Co.*, 232 US 399, 410, 58 L ed 658, 662.)

Under the Act of 1908 notice was taken of the employer test in a number of cases although it was clear the employer-

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51a. The FELA in this respect is unlike the Fair Labor Standards Act under the terms of which application of the statute is decided by looking to the activity of the employee alone. *McLeod v. Threlkeld*, 319 US 491, 497, 87 L.ed 1538, 1543, 1544, *Mabee v. White Plains Pub. Co.*, 327 US 178, 184, 90 L.ed 607, 613.

51b. We have pointed out that they are new in the Act of 1908 (see note 47 above). The history of their appearance gives them added significance (see p. 33 ff above).

defendant was acting as a railroad and a common carrier so that attention was centered upon the other phases of the Act. But the proposition for which these cases stand is not restricted, as will appear below, to a test of engaging in interstate commerce.

The meaning and effect of the limitations in § 1 of the Act were first before this Court in 1913. *Pedersen v. Delaware etc. R. Co.*, 229 US 146, 150, 157 L ed 1125, 1127, said:

> "Considering the terms of the statute, there can be no doubt that a right of recovery thereunder arises only where the injury is suffered while the **carrier** is engaged in interstate commerce, and where the employee is employed by the carrier in such commerce; * * * The true test always is: Is the work in question a part of the interstate commerce in which the **carrier** is engaged?"

In immediate sequence *St. Louis etc. R. Co. v. Seale*, 229 US 156, 158, 57 L ed 1129, 1133 said:

> "The real question, therefore, is, whether the Federal statute was applicable; and this turns upon whether the injuries which caused the death of the deceased were sustained while the **company** was engaged, and while he was employed by it, in interstate commerce."

Shanks v. Delaware etc. R. Co., 239 US 556, 557, 60 L ed 436, 438, which first stated the definitive test of what is interstate commerce under the Act (see p. 49 below), said:

> "Thus it is essential to a right of recovery under the Act not only that the **carrier** be engaged in interstate commerce at the time of the injury, but also that the person suffering the injury be then employed by the carrier in such commerce. And so it results **where the carrier is also engaged in intrastate commerce, or in what is not commerce at all**, that one who, while employed therein by the carrier, suffers injury through its

negligence, or that of some of its officers, agents, or employees, must look for redress to the laws of the state wherein the injury occurred. * * *"

Accord:

North Carolina R. Co. v. Zachary, 232 US 248, 256, 58 L ed 591, 594;[52]

Ill. C. R. Co. v. Behrens, 233 US 473, 478, 58 L ed 1051, 1055;[53]

Delaware etc. R. Co. v. Yurkonis, 238 US 439, 59 L ed 1397 quoted in note 99 below.

A second proposition, applicable to both tests is that the inquiry must be as of a relevant time. The status of the parties is to be determined as of the time of injury. How they were acting or what they were doing at some different time can be of no consequence. The cases for this proposition will be found below under the discussion of interstate commerce (see p. 47 ff).

B. LIMITED COVERAGE OF THE ACT AS TO PERSONS

The employer at whom the act is directed is the "common carrier by railroad". These words "as used in the Act, mean

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52. "In order to bring the case within the terms of the Federal Act, **defendant** must have been, at the time of the occurrence in question, engaged as a **common carrier** in interstate commerce, and plaintiff's intestate must have been employed by said **carrier** in such commerce."

53. The court quotes with approval the language from *Pedersen* which we have quoted in the body.

Ill. C. R. Co. v. Rogers, 221 Fed. 52, 54 (Circ. 5) held that an averment that "at the time of said accident the said railroad company was a common carrier by railroad, engaged in interstate commerce" was insufficient to show that the railroad was engaged as alleged **with respect to the activity in which the employee was engaged** when he was hurt. The averment could be true but the railroad so engaged elsewhere. Acc. *Tipton v. Atchison etc. Ry. Co.*, note 81 below.

one who operates a railroad as a means of carrying for the public, that is to say, a railroad company acting as a common carrier" and this construction "is in accord with the ordinary acceptation of the words" (*Wells Fargo & Co. v. Taylor*, 254 US 175, 187, 65 L ed 205, 213). With equal propriety the words mean only common carriers which carry by railroad. They do not describe an employer who is acting neither as a carrier nor as a common carrier nor as a railroad.

The Act does not apply to an employer who is neither a common carrier nor a railroad although engaged in work for a railroad which is essential to its operation, which the railroad itself, as to the public, is under duty to do, which it could do and which some railroads do for themselves. The Act does not apply in case of injury to an employee of an independent contractor who is maintaining the railroad's right of way (*Dougall v. Spokane etc. Co.*, 207 F2d 843 (Circ. 9), cert. den. 347 US 904, 98 L ed 1063)[54] or providing refrigerator cars and "protective service" for the shipment of perishables (*Gaulden v. So. Pac. Co.*, 78 F. Supp. 651 (N.D. Cal.), aff'd "on the grounds and for the reasons stated in the opinion of the trial court", 174 F2d 1022 (Circ. 9)[55].

The result is the same where the employer for his business uses railroad facility, or provides accessorial railroad service, as a common carrier, but is not acting as a railroad.

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54. Compare *Chicago etc. Ry. Co. v. Bond*, 240 US 449, 60 L.ed 735, holding that an individual under contract to furnish labor to handle coal, wood, cinders and sand for a railroad was not an employee but an independent contractor.

55. This Court has not had occasion to deal with the status of car service companies under the FELA but it has held that they are not common carriers by railroad under the Interstate Commerce Act. (*Ellis v. I. C. C.*, 237 US 434, 59 L.ed 1036; *U. S. ex rel. v. I. C. C.*, 265 US 292, 68 L.ed 1024; *U. S. v. Fruit Growers Exp. Co.*, 279 US 363, 73 L.ed 739.)

The FELA does not apply to an express carrier (*Wells Fargo & Co. v. Taylor*, 254 US 175, 65 L ed 205; *Jones v. N.Y.C.R. Co.*, 182 F2d 326 (Circ. 6), decided after the 1939 amendment) or to an employer providing sleeping cars or sleeping-car service (*Robinson v. B. & O. R. Co.*, 237 US 84, 59 L ed 849; *Taylor v. N.Y.C.R. Co.*, 294 NY 397, 62 NE2d 777, cert. den. 326 US 786, 90 L ed 477). These employers would have fallen within the Act of 1906 (see *Howard*, quoted p. 34 above) but effect must be given to the limiting words "by railroad" in the Act of 1908. (And cf. *United States ex. rel. v. I.C.C.*, 265 US 292, 297, 68 L ed 1024, 1027[56]). The liability is "imposed only on interstate carriers **by railroad**, although there are other interstate carriers" (*Mondou v. N.Y. etc. R. Co.*, 223 US 1, 53, 56 L ed 327, 347; cf. *Re Vaul v. So. Kan. Stage Lines Co.*, 150 Kan. 641, 95 P2d 541).

Finally the inquiry is not ended if it is found that the employer, as to **some** of its business, is a common carrier by railroad. It must be found to be such in the activity in which the injured man is employed. *Howard* (quoted p. 36 above) in arguing that the coverage of the Act of 1906 went beyond the power of Congress pointed out that the language was broad enough to cover the activity of an employer which, as to some of its business, was a common carrier when it had "shops * * * for construction work" and, indeed, was "engaged in other independent enterprises." *Shanks* (quoted p. 39 above) said the carrier might be engaged "in what is not commerce at all". A railroad, in connection with the construction of an extension may act as a carrier by

56. "If the Car Company is a carrier by railroad, it would seem to follow that sleeping car companies and express companies are likewise included within the words. Evidently, however, Congress did not think so, since § 209 of the act contains special provisions in respect of these companies, which would have been entirely unnecessary if they had been so included."

railroad but as a **private** carrier, not a common carrier. "In constructing, improving, or repairing its road, and in building its extensions and branches, the railroad company is providing facilities for its service as a common carrier, **but, of course, is not acting as such.** It may do the work itself, if it chooses, or it may make it the subject of contract with another."[57] (*Santa Fe etc. Ry. Co. v. Grant Bros. Const. Co.*, 228 US 177, 57 L ed 787.[58]) And *So. Pac. Co. v. Jensen*, 244 US 205, 213, 61 L ed 1086, 1097 held that this petitioner, a common carrier by railroad as to some of its business, did not fall within the FELA when it was acting as a common carrier by water, operating an off-shore vessel.[59] (Cf. *Nogueira v. N. Y. etc. Co.*, 281 US 128, 74 L ed 754;[60] *Buren v. So. Pac. Co.*, 50 F2d 407 (Circ. 9), cert. den. 284 US 638, 76 L ed 543;[60] *So. Ry. Co. v. Taylor*, 16 F2d 517 (Circ. Dist.

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57. "It is well settled by the authorities that the same person or corporation may be engaged in one line of business as a common carrier and in another line of business as a private carrier. (Citing cases.)" (*Chenery v. Employers' etc. Corp.*, 4 F2d 826, 827 (Circ. 9).

58. Action for loss of property being carried by the railroad. The railroad had employed a construction company, under contract, to do construction work on an extension and in the contract limited its liability for loss of property being carried by it for the contractor. Held, that the railroad was not acting as a common carrier and, by consequence, its contractual limitation of liability was valid.

59. The court noticed that the Act of 1906 had been held unconstitutional, that the Act of 1908 "is carefully limited" and after quoting the Act of 1908 said: "Evidently the purpose was to prescribe a rule applicable where the parties are engaging in something having direct and substantial connection with **railroad** operations; and **not with another kind of carriage** recognized as separate and distinct from transportation on land and no mere adjunct thereto." It was beyond question that both the employer and employee were engaged in interstate commerce. The employee was handling interstate freight.

60. In *Nogueira* the employee was a freight handler loading freight into cars on a float. In *Buren* the injured man was a brakeman handling brakes on freight cars about to be taken off a car ferry. The work and the injury in both was maritime and the Longshoremen's Act and not the FELA applied. Cf. *O'Rourke*, p. 94 below and note 129 below.

Col.), cert. den. 273 US 767, 71 L ed 882;[61] *Foley v. Hines*, 119 Me. 425, 111 Atl. 715, cert. den. 256 US 690, 65 L ed 1173[62]; *Hammill v. Penn. R. Co.*, 87 NJL 388, 94 Atl. 313, aff'd 88 NJL 717, 96 Atl. 292.[63]

The words "employed" and "employee" present no problem peculiar to the FELA or to railroads. There is no issue of employment here but for the sake of completeness this Court's holdings are briefly stated.

This court, in holding that a Pullman porter was not an employee of the railroad (*Robinson v. B. & O. R. Co.*, p. 43 above) said:

> "We are of the opinion that Congress used the words 'employee' and 'employed' in the statute in a natural sense, and intended to describe the conventional relation of employer and employee".[64]

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61. The plaintiff was injured while operating a passenger elevator in a railroad office building in the District of Columbia. The applicable statute, if it applied at all, was the Act of 1906 which was constitutional in the District of Columbia (see note 46 above). It was held not to apply because "the operator of an elevator in an office building is not a common carrier nor is he engaged in commerce. * * * In reaching our decision, **it is not a relevant matter of concern that the general business of defendant company is that of a common carrier,** and that its office building is used as the center from which the operation of its extensive system of railroads is directed and controlled."

62. Plaintiff, an employee of Portland Terminal Co. was injured while "trimming coal" in the hold of a vessel. The defendant owned and operated certain railroad property and also owned a wharf. It was immaterial that the coal had moved in interstate commerce on the vessel. "That steamer was not owned by the defendant, and formed no part of its system and the Federal Act applies only to 'a common carrier by railroad.'"

63. Pennsylvania Railroad Company was operating a canal as lessee. "The federal act does not apply, because by its terms it affects only common carriers by railway. It is true that the employer is a railroad company, but as such employer of deceased it was operating a canal and not a railroad."

64. This language was repeated in *Hull v. Philadelphia etc. Co.*, 252 US 475, 479, 64 L ed 670, 673. For a later Court of Appeals case see *Dougall v. Spokane etc. Ry. Co.*, 207 F2d 843, 846 (Cir. 9) cert. den. 347 US 904, 98 L ed 1063.

The holdings in the few cases which have come to this court[64a] are in harmony with the *Robinson Case*. A lessor railroad was held liable to the employee of the operating lessee but this was because local law established "the responsibility of the lessor for all acts of negligence of the lessee occurring in the conduct of business on the lessor's road" (*No. Car. R. Co. v. Zackary*, 232 US 248, 257, 58 L ed 591, 595). The usual test of right to control the way the work shall be done as well as the result to be accomplished (*Standard Oil Co. v. Anderson*, 212 US 215, 53 L ed 480) to make one an employee was applied to determine that a man who was killed was an independent contractor and not an employee (*Chicago etc. R. Co. v. Bond* 240 US 449, 60 L ed 735). Pullman porters (*Robinson v. B. & O. R. Co.*, p. 43 above) and express messengers (*Wells Fargo & Co. v. Taylor*, 254 US 175, 65 L ed 205) are not employees of the railroad although an express messenger if he actually did some railroad work might be its special employee while he was doing this work (see *Missouri etc. Ry. Co. v. West*, 232 US 682, 58 L ed 795) and by the same token a porter in the general employ of a railroad is not its employee while handling United States mail under the direction of a United States postal clerk (*Denton v. Yazoo etc. R. Co.*, 284 US 305, 76 L ed 310). A member of a road crew does not leave the service of his general employer and become an employee of another railroad over whose tracks his employer's trains are operated (*Hull v. Philadelphia etc. Co.*, 252 US 475, 64 L ed 670) but the crew of one railroad may be loaned to another railroad to do the latter's work and then become the employees of the railroad whose work they are doing (*Linstead v. C. & O. Ry. Co.*, 276 US 28, 72 L ed 453). The work need not be for com-

64a. Decisions of other courts are collected in a note in 30 ALR 2d 517.

pensation if the injured man is doing the work of the railroad at the request of an employee of the railroad who is authorized to get such assistance (*Baltimore etc. Co. v. Burtch*, 263 US 540, 68 L ed 433).

C. LIMITED COVERAGE AS TO ACTIVITY

The employer is within the act only "**while engaging** in commerce between any of the several states"[65] and the employee within the Act of 1908 is only that employee "suffering injury while he is employed by **such** carrier in **such** commerce".

The fatal defect of the Act of 1906, upon which rested the holding of its unconstitutionality in *Howard*, was that it covered all employees of a common carrier which was engaged in interstate commerce (p. 34 above). The design of the limiting wording in the Act of 1908 was to eliminate this defect by providing that the Act should **not** apply to all employees (see p. 37 above). By consequence, and it has been so held consistently, "the mere fact of employment" by an employer such as the Act describes "does not bring such employees within the Act." (*New York etc. R. Co. v. Bezue*, 284 US 415, 419, 76 L ed 370, 374.)

An employee of a described carrier might do only local work. He might do only interstate work. But he might do one type of work at one time and the other type at another. The Act recognized this. It imported a time test—it applies only to the employee who is injured "while" employed in interstate commerce. (Cf. note 48 above.) For the Act to apply,

65. In the usual situation it is readily apparent that the employer is a railroad and a common carrier. If the employee, at the time he is injured, is in the course of his employment and is engaged in interstate commerce from this alone his employer is normally also so engaged. Because of this the opinions usually speak in terms of the work the employee was doing.

the employee must have been engaged in interstate commerce at the very time of injury.

"Giving to the words 'suffering injury **while** he was employed by such carrier in such commerce' their natural meaning, as we think must be done, it is clear that Congress intended to confine its action to injuries occurring when the particular service in which the employee is engaged is a part of interstate commerce. * * * Here, at the time of the fatal injury, the intestate was engaged in moving several cars, all loaded with intrastate freight, from one part of the city to another. * * * That he was expected, upon the completion of that task, to engage in another which would have been a part of interstate commerce is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury."

Ill. C. R. Co. v. Behrens, 233 US 473, 478, 58 L ed 1051, 1055, and see note 77 below.

"What his employment was on other occasions is immaterial for, as before indicated, the Act refers to the service being rendered when the injury was suffered."

Shanks v. Delaware etc. Co., 239 US 556, 558, 60 L ed 436, 438.

"So, also, as the question is with respect to the employment of the decedent at the time of the injury it is not important whether he has previously been engaged in interstate commerce, or that it was contemplated he would be so engaged after his immediate duty had been performed."

Chicago etc. Co. v. Harrington, 241 US 177, 179, 60 L ed 941, 942.

This rule was never questioned. Additional cases are cited below, at p. 53. It resulted that in some railroad service "during the same day, railroad employees often

and rapidly passed from one class of employment to another" (*N. Y. etc. R. Co. v. Carr*, 238 US 260, 262, 59 L ed 1298, 1299); "that the same employee of a railroad company may have different rights at different times is a familiar consequence of the application of different laws, as, for example, when the employee of a railroad company is engaged at one time in intrastate commerce and at another time, even on the same day, in interstate commerce" (*Nogueira v. N. Y. etc. R. Co.*, 281 US 128, 137, 74 L ed 754, 760). Modification of this rule was one of the objectives of the amendment of 1939 (see p. 66 below).

The other phase of the problem, what for the employer was "commerce between any of the several states" and what for the employee was employment "in **such** commerce" was more troublesome and productive of a considerable number of cases that reached this Court.

Pedersen v. Delaware etc. Co., 229 US 146, 57 L ed 1125, the first case to present the question, held that carrying bolts to be used in repairing a bridge in use on a line carrying interstate trains fell within the Act. The Court framed the problem this way: "Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it?" It answered that "the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal effect a part of it." (See also note 94 below.) A little later *Shanks v. Delaware etc. R. Co.*, 239 US 556, 60 L ed 436 held that repairing a shaft in a machine shop did not fall within the Act and stated what became the definitive test:

> "Having in mind the **nature and usual course of the business** to which the Act relates and the evident purpose of Congress in adopting the Act, we think it speaks

of interstate commerce, not in a technical legal sense, but in a practical one better suited to the occasion, (see *Swift & Co. v. United States*, 196 US 275, 398, 49 L ed 518, 525, 25 SCt 276), and that the true test of employment in such commerce in the sense intended is, was the employee at the time of the injury, engaged in interstate **transportation**, or in work so closely related to it as to be **practically a part of it?**"

Six years later in *Ind. Acc. Com. v. Davis*, 259 US 182, 187, 66 L ed 888, 892, this court again considered the test and adhered to the test of *Shanks* and stated the rationale:

> "The Federal Act gives redress only for injuries received in interstate commerce. But how determine the commerce? Commerce is movement, and the work and general repair shops of a railroad, and those employed in them, are accessories to that movement—indeed, are necessary to it; but so are all attached to the railroad company — official, clerical, or mechanical.[65a] Against such a broad generalization of relation we, however, may instantly pronounce, and successively against lesser ones, until we come to the **relation of the employment to the actual operation of the instrumentalities** for a distinction between commerce and no commerce. In other words, we are brought to a consideration of degrees, and the test declared, that the employee, at the time of the injury, must be engaged in interstate transportation or in work so closely related to it as to be practically a part of it, in order to displace state jurisdiction and make applicable the Federal Act."

The *Shanks* test was generally adhered to. In 1920, in *Erie R. Co. v. Collins*, 253 US 77, 64 L ed 790 and *Erie R. Co. v. Szary*, 253 US 86, 64 L ed 794, there was an inadvert-

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65a. Cf. *Reed v. Penn. R. Co.*, 227 F2d 810, 813 (Circ. 3), cert. gr., discussing the 1939 amendment to § 1.

ent departure. In 1931 and 1932 the subject was reexamined in 3 cases *Chicago etc. Ry. Co. v. Bolle*, 284 US 74, 76 L ed 173, *Chicago etc. R. Co. v. Ind. Com.*, 284 US 296; 76 L ed 304, which "definitely overruled" *Collins* and *Szary*; and *N. Y. etc. R. Co. v. Bezue*, 284 US 415; 76 L ed 370. *Bolle* reaffirmed *Shanks* and, after quoting so much of it as we have above, said (284 US at 78):

> "It will be observed that the word used in defining the test is 'transportation' not the word 'commerce.' The two words were not regarded as interchangeable, but as conveying different meanings. Commerce covers the whole field of which transportation is only a part; and the word of narrower significance was chosen understandingly and deliberately as the appropriate term. **The business of a railroad is not to carry on commerce generally. It is engaged in the transportation of persons and things in commerce**; and hence the test of whether an employee at the time of his injury is engaged in interstate commerce, within the meaning of the act, naturally must be whether he was engaged in interstate **transportation** or in work so closely related to such transportation as to be **practically a part of it.**"[66]

Chicago etc. R. Co. v. Ind. Com., pointed out that the error discussed in *Bolle* had been made in *Collins* and *Szary*[67] and on this ground overruled them. *Bezue* restated the rationalization of *Ind. Acc. Com.*, p. 50 above, and said:

> "All work performed in railroad employment may, in a sense, be said to be necessary to the operation of

66. *Bolle* referred to a number of the cases which followed *Shanks* and said: "The applicable test thus firmly established is not to be shaken by the one or two decisions of this court where, inadvertently, the word 'commerce' has been employed instead of the word 'transportation.'"

67. It was said they inadvertently substituted "interstate commerce" for "interstate transportation".

the road. The business could not be conducted without repair shop employees, clerks,[67a] janitors, mechanics and those who operate all manner of appliances not directly or intimately concerned with interstate transportation as such, or with facilities actually used therein. But we have held that the mere fact of employment does not bring such employees within the Act."

This being the definitive test ("was the employee at the time of the injury, engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?") and its rationalization, adhered to after departure and reexamination, what was the result of its application in this Court?

Nothing could be closer to transportation by railroad than actual handling of vehicles of transportation,—it is the transportation. The Act applies to enginemen, trainmen and switchmen handling power and cars in the course of movement from state to state or carrying shipments in course of such movement in road service (*Mondou v. N. Y. etc. R. Co. and N. Pac. Ry. Co. v. Babcock*, 223 US 1, 56 L ed 327;[68] *Chicago etc. Ry. Co. v. Wright*, 239 US 548, 60 L ed 431;[69] *Ill. C. R. Co. v. Peery*, 242 US 292, 61 L ed 309;[70] *Seaboard A. L. R. Co. v. Duvall*, 225 US 477, 56 L ed 1171[71])

67a. See, under the 1939 amendment, *Reed v. Penn. R. Co.*, 227 F2d 810 (Cir. 3), cert. gr.

68. The facts are those stated in the pleadings. In both cases it was alleged that the employee was a locomotive fireman, that the defendant was a common carrier by railroad engaged in interstate commerce and that the employee was employed by it in such commerce.

69. Deceased was the engineer of a road engine moving from one state to another to be repaired. "That the engine was not in commercial use, but merely on the way to a repair shop, is immaterial."

70. See note 76 below.

71. Baggageman and flagman on a passenger train running between states.

and switching service (*Seaboard A. L. Ry. v. Moore*, 228 US 433, 57 L ed 907;[72] *Grand Trunk W. Ry. Co. v. Lindsay*, 233 US 42, 58 L ed 838;[73] *Seaboard A. L. Ry. v. Koennecke*, 239 US 352, 60 L ed 324;[74] *Philadelphia & R. Ry. Co. v. Polk*, 256 US 332, 65 L ed 958[75]). The Act does not apply if the movement is wholly local,—if the movement is a separate and distinct movement between two points in the same state without crossing state lines, the freight or passengers being carried are not in course of an interstate journey and the movement is not for the purpose of facilitating part of an interstate movement. The test is the work being done at the time. It is immaterial what task was just completed or what the next task is. The rule is the same for road (*Ill. C. R. Co. v. Peery*, above,[76]) and switching service (*Ill. C. R. Co. v. Behrens*, 233 US 473, 58 L ed 1051;[77] *Chicago etc. R.*

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72. The train being switched was hauling 2 freight cars loaded with lumber in course of interstate shipment. The court correctly instructed that it was plaintiff's duty to prove that at the time he was injured he was engaged in interstate commerce.

73. Switching 4 loaded freight cars moving in interstate commerce. If the facts alleged show that the Act applies the Act need not be formerly invoked.

74. "The deceased was engaged in distributing the cars from an interstate train and clearing the track for another interstate train."

75. The draft being worked contained some local cars, others loaded with freight bound for points outside the state or from such points and one car passing through the state. A judgment affirming a state compensation award was reversed.

76. Plaintiff was a freight conductor working a turn-around between 2 points in Kentucky. On the trip out his train handled interstate cars. On the trip back it handled only local cars. He was hurt on the trip back. The Act did not apply,—"the trips out and back were distinct." The interstate character of the trip out did not carry over to the trip back.

77. Fireman on a switch engine. "The crew handled interstate and intrastate traffic indiscriminately, frequently moving both at once and at times turning directly from one to the other. At the time

Co. v. Harrington, 241 US 177, 60 L ed 941;[77] *Erie R. Co. v. Welsh*, 242 US 303, 61 L ed 319;[79] *Lehigh V. R. Co. v. Barlow*, 244 US 183, 61 L ed 1070;[80] *Tipton v. Atchison etc. Ry. Co.*, 298 US 141, 80 L ed 1091[81]).

The Act did apply to a switchman who had finished his shift and had started to leave the yard; he was "discharging a duty of his employment. Like his trip through the yard to his engine in the morning, it was a necessary incident of his

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of the collision the crew was moving several cars loaded with freight which was wholly intrastate, and upon completing that movement was to have gathered up and taken to other points several other cars as a step or link in their transportation to various destinations within and without the state." The Act did not apply. The court said that it entertained no doubt that Congress could have extended the Act to cover such situation but held that it had not done so. The work deceased was doing at the time "was not a service in interstate commerce * * *. That he was expected, upon the completion of that task, to engage in another which would have been a part of interstate commerce is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury."

78. Cars containing coal for use in defendant's locomotives had moved to a storage track and, after being there for some time, were being switched to the coal shed. The movement to the storage track "had long since ended". This switching move was distinct and local. The Act did not apply. There was no "close or direct relation to interstate transportation in the taking of the coal to the coal chutes. This was nothing more than the putting of the coal supply in a convenient place from which it could be taken as required for use."

79. Plaintiff was a yard conductor employed in switching. The crew had placed an interstate freight car, spotted a caboose, stopped for water and returned to the yard office for further orders. Plaintiff was injured before he received these orders. The orders he would have received, had he not been injured, would have required him immediately to make up an interstate train. The Act did not apply. Cf. *Winters*, note 90 below; *Falcone*, note 87 below.

80. The facts are like those in *Harrington*, note 78 above, and that case was followed.

81. Action by a switchman based on violation of the Safety Acts (see note 36 above). A demurrer to the complaint was properly sustained because it failed to allege that he was engaged in interstate commerce. See note 53 above.

day's work, and partook of the character of that work as a whole, for it was no more an incident of one part than of another. His day's work was in both interstate and intrastate commerce * * *." (*Erie R. Co. v. Winfield*, 244 US 170, 61 L ed 1057.[82])

Work with equipment assigned to an interstate journey, necessary to the journey and immediately preceding it (*Norfolk & W. Ry. Co. v. Earnest*, 229 US 114, 57 L ed 1096,[83]), and servicing equipment in the course of an interstate journey (*N. Y. etc. R. Co. v. Walsh*, 223 US 1, 56 L ed 327[84]) or definitely assigned to such a journey as the next service (*N. Car. R. Co. v. Zachary*, 232 US 248, 58 L ed 591;[85] *Southern Ry. Co. v. Lloyd*, 239 US 496, 60 L ed 402;[86] *N. Y. C. R. Co. v. Marcone*, 281 US 345, 74 L ed 892[87]) are within the Act. But making heavy repairs on equipment

82. Compare *DiDonato*, note 92 below. These cases go far to explain the choice Congress made in the language and theory of the 1939 amendment that if **any part** of the employees' duty furthers or directly or closely and substantially affects interstate commerce the Act applies.

83. Plaintiff "was piloting a locomotive through several switches to a main track, where the locomotive was to be attached to an interstate train." Compare what was said in *Pedersen*, quoted in note 94 below.

84. Deceased was replacing a draw bar on a car then in use in interstate commerce.

85. Deceased was a fireman. After inspecting, oiling, firing and preparing a locomotive for an interstate trip he left his engine and was going to his boarding house on a personal errand. The temporary absence was not such that he was no longer "on duty".

86. An engineer was operating a locomotive on a sidetrack and oiling and inspecting it. It was alleged that the locomotive was used exclusively in interstate commerce; there was evidence to support the claim and the issue was properly left to the jury.

87. Deceased was a grease monkey servicing a locomotive in a roundhouse. The locomotive "was used in hauling interstate trains. It was not withdrawn from service." Even if deceased had finished his work his "presence on the premises was so closely associated with his employment in interstate commerce as to be an incident of it". Cf. *Welsh*, 242 US 303, 61 L ed 319, note 79 above.

withdrawn from service for repairs is not within the Act (*Ind. Ave. Com. v. Davis*, 259 US 182, 66 L ed 888;[88] *N. Y. etc. R. Co. v. Beeue*, 284 US 415, 76 L ed 370[89]). And the same is true of work of repair on a locomotive used in interstate and intrastate service but, at the time, not "destined especially for anything more definite than such business as it might be needed for." (*Minneapolis etc. R. Co. v. Winters*, 242 US 353, 61 L ed 358[90])

Work which directly facilitates interstate movements, either in immediate association with them or keeping the line open for them, is so closely related to them as to be practically a part of them. A road brakeman, doing way switching, was setting handbrakes to tie down 2 intrastate cars which had been switched out of a train containing interstate cars in order that the interstate train might proceed. The Act applied. (*N. Y. etc. R. Co. v. Carr*, 238 US 260, 59 L ed 1298.) Switching local cars to clear the way for immediate spotting, or reaching and moving, an interstate car falls under Act.[91] (*Penn. Co. v. Donat*, 239 US 50, 60 L ed 139;

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88. The injured man was working upon an engine which had been employed in interstate commerce and would be so employed again. It came in the shop for a "general overhaul" on December 1, 1918. The work was not completed until February 25, 1919. It was said that "the tracks, bridges and roadbed and equipment in actual use, may be said to have definite character, and give it to those employed upon them. But equipment out of use, withdrawn for a period, may or may not partake of that character, according to circumstances".

89. See this case quoted in part at p. 51 above. Whether the Act applied "must be decided not by reference to the kind of plant in which 'plaintiff' worked or the character of labor he usually performed, but by determining whether the locomotive in question was, at the time of the accident, in use in interstate transportation or had been taken out of it."

90. "An engine as such, is not permanently devoted to any kind of traffic * * *. It simply had finished some interstate business and had not yet begun upon any other." Cf. *Welsh*, note 79 above.

91. See *Koennecke*, note 74 above.

Louisville & N. R. Co. v. Parker, 242 US 13, 61 L ed 119) Clearing wreckage from a track so that interstate cars may move over it (*Southern Ry. Co. v. Puckett*, 244 US 571, 61 L ed 1321) and, for the same purpose, clearing snow from between a track and a platform (*N. Y. C. R. Co. v. Porter*, 249 US 168, 63 L ed 536) and clearing away dirt which had been dumped for filling under a trestle (*Kinzell v. Chicago etc. Ry. Co.*, 250 US 130, 63 L ed 893) are within the Act. Analogous, and leading to the same result, is the service of a "crossing watchman" at a public crossing,—"his employment concerned both kinds of trains" (*Philadelphia & R. Ry. Co. v. DiDonato*, 256 US 327, 65 L ed 955).[92]

Less directly connected with the actual movement of interstate cars but directly connected with and essential to their orderly movement was the work of yard clerks who recorded their movement. The clerks were under the Act when their work was in connection with interstate cars. (*St. Louis etc. Ry. Co. v. Seale*, 229 US 156, 57 L ed 1129; *Pecos etc. Ry. Co. v. Rosenbloom*, 240 US 439, 60 L ed 730)

Tracks and bridges, and the power line for an electric railroad, are as essential to interstate transportation by railroad as the wheels of power units and cars. When devoted to interstate transportation they are so devoted permanently and take character from that transportation even though they are also used for purely local movements.[93] The work of maintaining and repairing them is so closely related to the interstate transportation, of which they are a part, as to be practically a part of it. The Act applies. (*Pedersen v. Delaware etc. R. Co.*, 229 US 146, 57

92. Compare *Winfield*, 244 US 170, 61 L ed 1057, p. 55 above. See note 82 above.

93. Cf. *Winfield*, 244 US 170, 61 L ed 1057, p. 55 above, and *DiDonato*, 256 US 327, 65 L ed 955, just above.

L ed 1125;[94] *N. Y. C. R. Co. v. Winfield*, 244 US 147, 61 L ed 1045;[95] *Philadelphia etc. R. Co. v. Smith*, 250 US 101, 63 L ed 869;[96] *So. Pac. Co. v. Ind. Acc. Com.*, 251 US 259, 64 L ed 259.[97])

Pedersen, just above, is not only the leading case for the proposition just noticed, but is a leading case on this whole subject (see p. 49 ff above). It was careful to distin-

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94. The case is briefly stated and quoted at p. 49 above. The point was made that plaintiff was not actually working on the bridge but merely carrying to the place where the work was to be done some of the materials to be used. This Court said: "We think there is no merit in this. It was necessary to the repair of the bridge that the materials be at hand, and the act of taking them there was a part of that work. In other words, it was a minor task which was essentially a part of the larger one, as is the case when an engineer takes his engine from a roundhouse to the track on which are the cars he is to haul in interstate commerce." See note 83 above.

95. Plaintiff was a laborer assisting in the repair of the main track and tamping cross ties. Cf. *Puckett* and similar cases, p. 57 above.

96. Plaintiff's principal duties were taking care of a camp car used by a bridge gang who were employed in the repair of bridges and cooking meals for the gang. He was injured while cooking. The Act was held so to apply because the work of the bridge carpenters was in effect a part of interstate transportation and plaintiff's work had the object and effect "of forwarding their work by permitting them to conduct it conveniently at points remote from their homes"; he "actually was assisting, the work of the bridge carpenters by keeping their bed and board close to their place of work * * * and forwarding their work by reducing the time lost in going to and from their meals and their lodging place." This case goes as far as any of the cases and its holding has been questioned in view of *Chicago etc. Ry. Co. v. Bolle*, 284 US 74, 76 L ed 173 and other cases presently to be dealt with. (*McLeod v. Threlkeld*, 319 US 491, 496, 87 L ed 1538, 1543.)

97. Deceased was a lineman. The railroad operated a power house where it generated electric current for electrically operated cars in interstate and intrastate commerce. From here the current was transmitted by main cables to trolley wires and the cars. Deceased was engaged in work "on one of the main lines necessary to keep it in serviceable condition." This court reversed a judgment which affirmed an award under the California Workmen's Compensation Act.

guish the maintenance work before it from **new construction and manufacturing**:[98]

> "Of course, we are not here concerned with the **construction** of **tracks**, bridges, engines, or **cars** which have not as yet become instrumentalities in such [interstate] commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such."

The court must have been mindful that *Howard*, p. 36 above, had given as an illustration of "matters wholly independent of interstate commerce" a road "having shops * * * for construction work" and that less than two months before its decision in *Pedersen* it had said in *Santa Fe etc. Ry. Co. v. Grant Bro's Const. Co.*, 228 US 177, 186, 57 L ed 787, 792 (see p. 44 above):

> "In constructing, improving, or repairing its road, and in building its extension and branches, the railroad company is providing facilities for its service as a common carrier, but, of course, is not acting as such."

When the question directly presented itself the court applied the distinction made in *Pedersen*. In *Raymond v. Chicago etc. Ry. Co.*, 243 US 43, 61 L ed 583, the railroad

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98. For cases from other fields holding that mining, manufacturing, generation of electric power and erection of a bridge are not commerce see *United Mine Workers v. Coronado Coal Co.*, 259 US 344, 407, 66 Led 975, 994; *Carter v. Carter Coal Co.*, 298 US 238, 298, 80 Led 1160, 1182; *Crescent Cotton Oil Co. v. Mississippi*, 257 US 129, 66 Led 166; *U. S. v. Darby*, 312 US 100, 113, 85 Led 609, 616; *Utah Power & L. Co. v. Pfost*, 286 US 165, 179, 76 Led 1038, 1045; *Kansas City S. S. Co. v. Arkansas*, 269 US 148, 70 Led 204.

Compare *Grant Smith-Porter Ship Co. v. Rohde*, 257 US 469, 66 Led 321. Plaintiff was injured while working on **construction** of a partly completed vessel launched and lying in navigable waters. Held, that "neither Rohde's general employment, nor his activities at the time, had any direct relation to navigation or commerce." **Repair** of a completed vessel is to be distinguished. (*Baizley Iron Works v. Span*, 281 US 222, 74 Led 819).

was cutting a new tunnel to shorten its main line. Raymond was injured while working in the tunnel. The Act did not apply: "Raymond **and the railway company** were not engaged in interstate commerce at the time"; the State Compensation Act applied "even although it be conceded that the railroad company was, in a general sense, engaged in interstate commerce". Accord, *N. Y. C. R. Co. v. White*, 243 US 188, 61 L ed 667, decided the same day. The deceased "was a night watchman, charged with the duty of guarding tools and materials intended to be used in the construction of a new station and new tracks upon a line of interstate railroad."

> "The admitted fact that the new station and tracks were designed for use, when finished, in interstate commerce, does not bring the case within the Federal act. * * * Decedent's work bore **no direct** relation to interstate transportation, had to do solely with construction work, which is clearly distinguishable, as was pointed out in *Pedersen v. Delaware, L. & W. R. Co.* * * *".

The court refers to *Harrington*, p. 61 below and *Raymond*, decided that day. Accord: *Minn. etc. R. Co. v. Nash*, 242 US 617, 61 L ed 531, memorandum opinion reversing 131 Minn. 166 and 495, 154 NW 957 and 155 NW 1102.

Finally the Act was held not to apply to acquiring and storing essential supplies for future use, preparing them for use and maintaining and repairing structures and buildings for the general service of the railroad but not part of the line itself and so not part of transportation on it. The Act did not apply in the following situations: mining coal for use in locomotives in interstate commerce (*Delaware etc. R. Co. v. Yurkonis*, 238 US 439, 59 L ed 1397[99]), taking

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99. "The mere fact that the coal might or was intended to be used in the conduct of interstate commerce after the same was mined

down and putting in a new location a countershaft in a machine shop operated for repairing locomotives (*Shanks v. Delaware etc. R. Co.*, 239 US 556, 60 L ed 436), switching coal to a coal shed, where it was to be placed in bins or chutes and supplied, as needed, to locomotives of all classes (*Chicago etc. R. Co. v. Harrington*, 241 US 177, 60 L ed 941 followed on similar facts, in *Lehigh V. R. Co. v. Barlow*, 244 US 183, 61 L ed 1079), starting an engine to pump water into a tank for supplying locomotives (*Erie R. Co. v. Collins*, 253 US 77, 64 L ed 790[100]), drying sand for use in locomotives (*Erie R. Co. v. Szary*, 253 US 86, 64 L ed, 794[100]), taking coal on a locomotive used to generate steam to heat a passenger depot, baggage room, structures used for general railroad purposes, suburban passenger coaches waiting to go into service, quarters occupied by maintenance-of-way personnel and, sometimes, to prevent freezing of a turntable (*Chicago etc. R. Co. v. Bolle*, 284 US 74, 76 L ed 173), and oiling a motor used to hoist coal into a chute from which it would be supplied to locomotives principally employed in moving interstate freight (*Chicago etc. R. Co. v. Ind. Com.*, 284 US 296, 76 L ed 304).

V. Application of the Act Does Not Necessarily Benefit the Employee.

If the Federal Employers' Liability Act does not apply the employee is not now remitted to the common-law remedy

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and transported did not make the injury one received by the plaintiff while he was engaged in interstate commerce. The injury happening when plaintiff was preparing to mine the coal was not an injury happening in interstate commerce, and **the defendant was not then carrying on interstate commerce**—facts essential to recovery under the employers' liability act.

100. These cases held that the Act applied but *Chicago etc. R. Co. v. Ind. Com.* "definitely overruled" them (see p. 51 above) because of an inadvertent error, pointed out in *Bolle* (see p. 51 above), and held that *Harrington* furnished the correct rule.

of another age with the defenses of the fellow-servant rule, contributory negligence and assumption of risk. "It is not amiss to point out that plaintiff is not without redress for his injury. The benefits of the Workmen's Compensation Act of California are available to him." (*Gaulden v. So. Pac. Co.*, 78 F Supp. 651 (N.D. Cal.) affirmed "on the grounds and for the reasons" stated by the trial court, 174 F2d 1022 (Circ. 9). Cf. *Reed v. Penn. R. Co.*, 227 F2d 810, 813 (Circ. 3), cert. gr.)

Upon the other hand, application of the Federal Act and consequent exclusion of any remedy under state law (see p. 28 above) depends **only** upon whether the employer and the employee meet the descriptive tests of the Federal Act and **not** at all upon whether there was negligence on the part of the employer and an award of damages can be made under the Federal Act (*N. Y. C. R. Co. v. Winfield*, 244 US 147, 61 L ed 1045;[100a] *So. Pac. Co. v. Ind. Acc. Com.*, 19 C2d 271, 280, 120 P2d 880; *Copley v. Ind. Acc. Com.*, 19 C2d 287, 120 P2d 879, cert. den. 316 US 678, 86 L ed 1752). The Federal Act may deprive the injured man of **all** relief. Unlike compensation statutes which provide for compensation for industrial injuries regardless of fault and require a showing only that the injury was suffered on the job, the Federal Act requires that the workman prove that negligence of his **employer** was a proximate cause of his injury. If the Act applies and he cannot make this proof, he alone must bear the full loss. (*Seaboard A. L. R. Co. v. Horton*, 233 US 492, 501, 58 L ed 1062; *Missouri P. R. Co. v. Aeby*, 275 US 426, 72 L ed 351; *B. & O. R. Co. v. Berry*, 286 US 272, 76 L ed 1099; *Delaware etc. R. Co. v. Korke*, 279 US 7, 73 L ed 578). This is as true after the 1939 amendment as before (*Brady v. South-*

100a. The holding is summarized in *Northern Coal & Dock Co. v. Strand*, 278 US 142, 147, 73 L.ed 232, 235.

ern Ry. Co., 320 US 476, 88 L ed 239; *Hunter v. Texas E. Ry. Co.*, 332 US 827, 92 L ed 402; *Eckenrode v. Penn R. Co.*, 335 US 329, 93 L ed 41; *Wilkerson v. McCarthy*, 336 US 53, 93 L ed 497; *Reynolds v. Atl. C.L.R. Co.*, 336 US 207, 93 L ed 618; *Moore v. C. & O. Ry. Co.*, 340 US 573, 95 L ed 547; *Reed v. Penn. R. Co.*, 227 F2d 810, 813 (Cir. 3), cert. gr.). He cannot invoke the state statute which, but for the Federal Act, would provide him with compensation.[100b]

A latitudinarian construction of the Act is not necessarily a "liberal" construction. (And see further p. 87 ff below.)

VI. The Amendment of 1939.

In 1939, against this background, the 76th Congress amended § 1 of the Act to broaden its application. It did this by reenacting the whole of § 1 as it then read and adding a new paragraph redefining the **employees** to whom the Act should apply (see p. 5 above). The Act of August 11, 1939, in this respect, was enacted as it was reported to the Senate by the Committee of the Judiciary. (See App. A)

Before the proposed amendment was reported to the Senate a significant change had been made in it after its introduction. As **reported and enacted** the new paragraph provided:

> "Any employee of a carrier, any part of whose duties as such employee shall be the **furtherance** of interstate

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100b. The flat statement of the rule, as we have made it, need not be softened because of the exceptional situation dealt with in *So. Buffalo Ry. Co. v. Ahern*, 344 US 367, 97 Led 395. The New York statute, unlike the California statute, expressly permitted use of the state machinery if the parties waived rights under federal statutes. They did and proceeded before the state board until the statute of limitations barred action under the FELA. The railroad then urged that the remedies of and procedure under the federal statute (including the bar of its limitation provision) occupied the field to the exclusion of the state statute and its procedures. It was held that it was too late for the railroad to shift its hold.

or foreign commerce; or shall, in any way **directly or closely and substantially,** affect such commerce"

shall be considered as employed in such commerce. It had read, after the semicolon, "or shall, **in any way,** affect such commerce". In Committee this was changed to read: "or shall, in any way **directly or closely and substantially,** affect such commerce".[100c]

The change is restrictive. To "in any way affect interstate commerce" covers a wider field than affecting such commerce "directly or closely **and** substantially".[101] The change to this more restrictive form of wording must be accorded significance. All talk in Congress is not appropriate for consideration "but the reports of a committee, including the bill as introduced, **changes made in the frame of the bill in the course of its passage,** and statements made by the committee chairman in charge of it, stand upon a different footing, and may be resorted to under proper qualifications

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100c. We take this from *Reed v. Penn. R. Co.*, 227 F2d 810 (Circ. 3) and *Ermin v. Penn. R. Co.*, 36 F Supp 936, 940 (E.D. N.Y.). The change was made at the suggestion of Senator Austin. Both cases quote Senator Austin, *Ermin* as follows:

> "Now on page 2, lines 18 and 19, occur the words 'or in any way'. Unless I am convinced I ought not to do that for some good reason, I think I will move to substitute for those words that occur and recur in many cases of recent date as defining what kind of effect on interstate is comprehended by the commerce clause of the Constitution. Those are the words, 'directly, closely and substantially'. I would substitute those words for the words 'or in any way' ".
>
> "My amendment was to substitute for the words 'or in any way' the words 'directly, closely and substantially'. That is the law as it is interpreted by the Supreme Court of the United States in *National Labor Relations Board against Jones & Laughlin Steel Corporation* [301 US 1, 57 SCt 615, 81 L.ed 893, 108 ALR 1352]; in the Bituminous Coal Cultivation Act of 1935, in connection with N.R.A. Codes and in *Carter versus Carter Coal Co.*, and others [238 US 238, 56 SCt 855, 880 L.ed 1160]."

101. The extent of the restriction is discussed below.

(citing cases)." (*United States v. St. Paul etc. Ry. Co.*, 247 US 310, 318, 62 L ed 1130, 1134; *Fox v. Standard Oil Co.*, 294 US 87, 96, 79 L ed 780, 787; *Helvering v. Wood*, 309 US 344, 348, 84 L ed 796, 798; *Steiner v. Mitchell*, ... US ..., 100 L ed (Adv. Op. 237), Oct. Term, 1955, No. 22.)

The report of the Senate Committee on the Judiciary to the Senate on the bill, so far as it deals with the proposed amendment to § 1, is set out in full in Appendix A. It demonstrates that the congressional objective was modest. There was no intention to sweep the Act aside and substitute a new scheme. The only intention was to broaden its coverage within the general field of **interstate railroad operation.**[101a] After 30 years of experience "Congress while liberalizing its benefits, [did] not see fit to extend the scope of the statute beyond railroading in its true sense." (See *Gaulden v. So. Pac. Co.*, 78 F Supp 651, 657 (N.D. Cal.), aff'd for the reasons and on the grounds stated below, 174 F2d 1022 (Circ. 9).)

A suggestion that the application of the Act to **employers** be broadened was expressly rejected. The Senate report, after setting out the proposed amendments, says:

> "The bill as introduced was intended to broaden the application of the act to include express, freight forwarding, and sleeping-car companies. Upon the hearings it was clearly shown that there is neither necessity nor demand for the inclusion of these companies in

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101a. *Reed v. Penn. R. Co.*, 227 F2d 810, 811 (Circ. 3), cert. gr., citing "Hearings Before a Subcommittee of the Senate Committee on the Judiciary, 76th Cong., 1st Sess., on S.1708 at 8" said, speaking of the 1939 amendment to § 1 of the FELA: "Mr. T. J. McGrath, General Counsel for the Brotherhood of Railroad Trainmen, said in advocating its adoption: 'Now if this amendment that we propose is put into the act it will, to a very large extent, wipe out the obscurity and the difficulty that now exists in attempting to determine when a man is or is not engaged in interstate commerce. *Its application will be confined, of course, to the character of employees now covered by the present act* * * *.'" (Italics those of the Court.)

the act. Therefore, they have been excluded from the substitute."

The aim of the bill (and we deal with the report only as it touches our problem) was stated:

> "It broadens and clarifies the law in its application to **employees** who may be killed or injured while in the service of a **railroad** company engaged in interstate or foreign **commerce.**"

Dealing specifically with the proposed amendment to § 1 the report says:

> "This amendment is intended to broaden the scope of the Employers' Liability Act so as to include within its provisions **employees** of common carriers who, while **ordinarily** engaged in the **transportation** of interstate commerce, may be, at the time of the injury, **temporarily** divorced therefrom and engaged in intrastate operations."

The report says that the Act had presented difficult questions, quotes *Shanks*, comments on the difficulty of proof which an employee will sometimes face and the failure, due to "uncertainty which exists in **borderline cases**", to obtain relief because of selection of the wrong remedy, and goes on:

> "**Railroad** men are frequently injured while **moving or working upon cars or engines** which have been **temporarily** withdrawn from interstate commerce and which were, just before or just after the injury, used in such commerce. In railroad **switching service**, particularly men may be engaged in interstate and intrastate commerce intermittently several times during a single tour of duty.[101b]
>
> "The adoption of the proposed amendment will, to a very large extent,[102] eliminate the necessity of deter-

101b. See *Carr* and *Nogueira*, p. 49 above.

102. Something less than "entirely".

mining whether an employee, at the very **instant of his injury** or death, was actually engaged in the movement of interstate traffic." If any part of the employee's duties **(at the time of his injury or death)** directly, closely, or substantially affected interstate or foreign commerce, the claimant would be considered entitled to the benefits of the act.

"The preponderance of service performed by railroad **transportation employees** is in interstate commerce. As to those who are constantly shifting from one class of service to another,[101b] the adoption of the amendment will provide uniform treatment in the event of injury or death while so employed."

United States v. St. Paul etc. Ry. Co., quoted p. 64 above, is authority supporting the use of this report as an aid in construing the statute as amended.[102a] (See to the same effect *United States v. C. I. O.* quoted p. 32 above. Accord: *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 US 384, 394, 95 L ed 1035, 1047; *Western P. R. Corp. v. Western P. R. Co.*, 345 US 247, 252, 97 L ed 986, 991; *McLean v. United States*, 226 US 374, 380, 57 L ed 260, 263; *Binns v. United States*, 194 US 486, 495, 48 L ed 1087, 1090.) We venture to suggest that in view of the abundance of adjudications under the Act of 1908, and the variety of facts dealt with, the report is as significant for what it does **not** say as for what it says.

What Congress actually did confirms the statement of limited objectives of the Senate report. The form of the amendment has its own significance. While the aim was to enlarge the coverage of the act "this was achieved *not by changing the main section*, but by adding a new clause to it.

102a. Cases under the amendment have resorted to it repeatedly (e.g. *So. Pac. Co. v. I. A. C.*, 19 C2d 271, 120 P2d 880, note 122 below) though, with deference, it is not clear that they have fully understood its import.

The main section still left the test of liability that the employee be "employed by such carrier in such commerce." (*Holl v. So. Pac. Co.*, 71 F Supp 21, 23 (N.D. Cal.).) Congress is presumed to know the construction put upon, and the application of, one of its enactments, at least by this Court where there has been a long course of adjudication. In such circumstances, where a specific change is made and the statute is otherwise reenacted the course of adjudication "has become part of the warp and woof of the legislation" as reenacted. (*Francis v. So. Pac. Co.*, 333 US 445, 449, 92 L ed 798, 803; *United States v. So. Buffalo Ry. Co.*, 333 US 771, 774, 92 L ed 1077, 1080; *N.L.R.B. v. Gullett Gin Co.*, 340 US 361, 365, 95 L ed 337, 343; *Walling v. Halliburton etc. Co.*, 331 US 17, 25, 91 L ed 1312, 1318; *McFeely v. Com'r.* 296 US 102, 110, 80 L ed 83, 89; and see the cases collected in Appendix B "Opinions during the past decade resting upon the rule that the reenactment of a statute carries gloss of construction placed upon it by this court" to the opinion of Mr. Justice Frankfurter in *Com'r v. Church*, 335 US 632, 690, 93 L ed 288, 323.)

In determining what Congress did and what it intended "we therefore consider the congressional history of the Act, the situation with reference to which it was enacted, and the existing judicial precedents, with which Congress may be taken to have been familiar in at least a general way" (*District of Columbia v. Murphy*, 314 US 441, 449, 86 L ed 329, 334. Cf. *United States v. C.I.O.*, p. 32 above.) To the extent that there was no change the reenactment of § 1 "became a continuation" of the Act (*Bingaman v. Golden etc. Lines*, 297 US 626, 628, 80 L ed 928, 931) with the construction which this Court had put upon it.

Here there is no occasion to resort to speculation or presumption. The Senate report demonstrates that Congress knew the course of decision in this court.

What then did the amendment do?

This Court, dealing with a related statute, pointed out that the 1939 amendment "merely redefines for the purposes of the Federal Employers' Liability Act the scope of the words 'employee' to include certain persons not theretofore covered, because they were [illegible] directly engaged in interstate or foreign commerce" (*Desper v. Starved Rock Ferry Co.*, 342 US 187, 190, 96 L ed 205, 209.[103])

There was no attempt to change the Act's definition of the employers covered,—the employer must still be a common carrier by railroad while engaging in commerce between the states. (*Latskó v. Nat. Carloading Corp.*, 192 F2d 905, 909 (Circ. 6).[104]) Congress knew that the Act had been so construed and that, by consequence, express companies and car service companies were excluded from its operation (see p. 43 above.) A suggestion that they be included was rejected (see p. 65 above).[105] The result, as to the express business or

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103. Respondent operated boats on the Illinois River. In 1947 Desper had been employed by it as a boat operator. In March, 1948, he was engaged for the season to resume his operator's duties when the boats were put in the water. Before then he was put to conditioning the boats which were blocked up on land. While doing this work he was killed. The attempt was to maintain an action under the Jones Act. It was argued that the 1939 amendment to the Federal Employers' Liability Act extended the scope of the word "seaman" in the Jones Act to include those whose work substantially affected navigation. The court used the language we have quoted in the body in rejecting this contention. (Cf. note 98 above.)

104. "The Federal Employers' Liability Act was amended in 1939, but the description of an employer liable under the Act was not changed * * *." And compare *Gaulden*, p. 95 below, and the cases cited with it; note 130.

105. *Jones v. N. Y. C. R. Co.*, 182 F2d 326, 328 (Circ. 6) said: "The Act was amended in 1939 but no effort was then made to include express companies within its terms. We are therefore justified in concluding that the Wells Fargo case had legislative approval. *United States v. Elgin J. & E. Ry. Co.*, 298 US 492, 500, 56 SCt 841, 80 L ed 1300."

car service business, would not be different if the company acquired a railroad and operated it as a common carrier. If Southern Pacific undertook to act as an express carrier over the lines of other railroads it would not, as to that business, be a common carrier **by railroad**, or under the Act. There is nowhere any suggestion that any of the rules noticed at p. 43 ff above have been changed or that if an employer who, as to some of its business, is a common carrier by railroad goes into the business of carriage by water, or manufacturing or mining the Act applies to those activities. There was no intention to change, and there was no change of, the rule of *Jensen* (p. 44 above), *Raymond* (p. 59 above) or *Yurkonis* (p. 60 above). There was no intention to change the double test of the statute (p. 39 above) and the rule that **both** the employer and the employee must meet the separate statutory tests for them. This Court has held that even though the **employee** fitted every description of the statute, and met every test, the Act, as amended in 1939, did not apply if the **employer** was not the employer contemplated by the statute. (*Penn. R. Co. v. O'Rourke*, 344 US 334, 97 L. ed 367.)

O'Rourke was a "rail",—a "freight brakeman" in petitioner's yard at Jersey City.[106] His work was in making up trains. It included work on car floats. While releasing hand-brakes on cars so that they might be pulled from a float he was injured. The District Court denied relief. The Second Circuit reversed (194 F2d 612) holding that the FELA applied; that the service was railroading not maritime. This Court reversed. The reason was that the **employer** fell within the definition of employer under the Longshoremen's and Harbor Workers' Act rather than that of the FELA.

106. It is clear that part of his duties was land switching of interstate cars.

The problem cannot be answered [as the Supreme Court of California tried to answer it] by looking alone at the type of work it is the employee's duty to do and ignoring the situation, with respect to that work, of the employer.

> "We are clear, however, that emphasis of the nature of respondent's [employee's] duties here misses the mark. The statute [Longshoremen's Act] applies, by its own terms, to accidents on navigable waters when the **employer** has employees engaged in maritime service. * * * Besides § 902(4) is directed at the employer when it speaks of maritime employment, not at the work the employee is doing. * * * If, then, the accident occurs on navigable waters, the Act must apply if the injured longshoreman was there in furtherance of his employer's business, irrespective of whether he himself can be labeled 'maritime.' "

O'Rourke rests on *Noguera v. New York etc. R. Co.*, 281 US 128, 74 L ed 754 and *Burton v. So. Pac. Co.*, 50 F2d 407 (Circ. 9) cert. den. 284 US 638, 76 L ed 543. If it be said that the explanation of those cases is that the Longshoremen's Act is later in time than the FELA and to the extent of its coverage superseded the FELA, then the holding of *O'Rourke* must be that the reenactment of § 1 of the FELA, after the Longshoremen's Act, did **not** constitute an enlargement of the definition of the **employer** contemplated by the FELA even to cover a field formerly covered by it.

Not only did the 1939 amendment not attempt an expanded definition of "railroad" but it did not attempt any new definition of commerce or interstate commerce. It reenacted the first paragraph of § 1 with the judicial gloss that had been added to it. (See p. 68 above.) Express reference to the *Shanks* test in the Senate report (p. 66 above) demonstrates that Congress knew the settled construction of

the FELA (pp. 49-52 above) and that under the FELA interstate commerce was "interstate **transportation** or work so closely related to it as to be **practically a part of it.**" For the Act to apply the employer must still be a common carrier by railroad while engaging in interstate transportation, or in work so closely related to it as to be practically a part of it.

We submit, that what is interstate commerce as to the employee of a railroad must be determined in the same way so that the effect of the new paragraph added to § 1 is as if it read:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign **transportation**, or work so closely related to it as to be **practically a part of it**; or shall, in any way directly or closely and substantially, affect such **transportation or such work** shall be considered as being employed by such carrier in interstate commerce" etc.

Some things about the enlarged definition of "employee" are tolerably clear; others are not as easy of solution.

On the negative side: The amendment did not sweep under the coverage of the Act **all** employees of common carriers by railroad engaged in interstate commerce. The Senate report and the very form and wording make this clear. Had Congress wanted the wider sweep it would have been a simple matter. (See *Holl v. So. Pac. Co.*, 71 F. Supp. 21, 23 (N.D. Cal.)) The coverage of the Act as amended in 1939 is not as broad as that of the Act of 1906 (see p. 33 above and *Taylor v. Lamaghi Coal Co.*, 252 Mo. 1212, 181 SW 2d 536, 539). It still remains that the mere fact of employment is not the test. The line has been moved but it still must be drawn. The result now will be different but it is still necessary to employ the process employed in *Davis* (p. 50 above and *Bezue*, pp. 51, 52 above.

It is reasonably apparent that in limiting and restricting the new definition of employee Congress had two considerations in mind which not only were reasons for limiting the enlargement worked by the amendment but were reasons of such nature that they help to point out the limit. On the first place Congress was conscious of the limits of its power and must be presumed to have had in mind the infirmities of the Act of 1906. (See p. 33 ff above.) But in the second place, unlike the situation in 1906 and 1908 when there were no state compensation statutes, in 1939 there were comprehensive state statutory schemes dealing with injury in modern industry and providing for benefits **even where the employer was not at fault.** (State Workmen's Compensation Laws as of September 1950, Bulletin No. 125, U. S. Dept. of Labor, Bureau of Labor Standards, U. S. Gov't Printing Office, 1950.)[107] These statutes can operate even though the employer is engaged in interstate commerce (*N. Y. etc. Co. v. White*, 243 US 188, 61 L ed 667; *Raymond v. Chicago etc. R. Co.*, 243 US 43, 45, 61 L ed 583, 585; *Boston & M. R. Co. v. Ahlburg*, 285 US 234, 76 L ed 729). Congress had no intention of intruding unnecessarily into a field adequately covered. This is the reason it restricted itself to "railroaders." This is the reason that there was no demand or need to include express, freight forwarding and sleeping-car companies (see p. 65 above). The Act was to be broadened to cover employees "who, while ordinarily engaged in the **transportation** of interstate commerce, may be, at the time of injury, temporarily divorced therefrom" (p. 66 above), not to sweep away state compensation schemes but to simplify, if

107. That the States have not been backward is shown by the fact that compensation payment progressively increased from $385,619,000 in 1944 to $845,799,000 in 1953. (Statistical Abstract of the United States, 1955, 76 ed.; U. S. Bureau of the Census, Washington, D. C., p. 268; and see earlier editions for earlier years.)

possible, the matter or application of the Federal Act in the case of those employees to whom it had applied. (See note 101a above.) It was the "railroad **transportation** employees" who had a preponderance of their service in interstate commerce. (See Senate Report, App. A hereto and p. 67 above.) And when the 1939 amendment is compared with other statutes having wider coverage (see p. 77 ff below) it is worth bearing in mind that the latter deal with matters as to which the states did not have comprehensive schemes.

On the positive side some matters seem equally clear. The objectives desired were reached. The "evils" that had developed in operation under the Act of 1908 were eliminated. The amendment abolishes the moment of injury rule under which application of the Act was determined by the **work being done** at the moment of injury. (*Behrens*, p. 48 above, *Shanks*, p. 48 above, *Harrington*, p. 48 above and similar cases, p. 47 ff above). The test is now the general character of the employment,—the **duties** assigned at the moment of injury. (Cf. *Winfield*, p. 55 above and *DiDonato*, p. 57 above). The act has greater continuity of application. In the course of a single tour of duty a man does not now "often and rapidly" pass from one class of employment to another (see *Carr* and *Noguéira*, p. 49 above). Congress followed the suggestion of *Behrens* that liability of the carrier be tested by what the employee was doing "in the course of its general work * * * whether the particular service being performed at the time of the injury, isolatedly considered, was in interstate or intrastate commerce" (233 US at 477, 58 L ed at 1054 col. 2) and that the character of the employment during a shift be fixed by the character of work of the shift as a whole, as was done with the crossing watchman DiDonato (p. 57 above) and men going to or coming from work (*Win-*

field, p. 55 above). The result was accomplished by making the test not the **work being done** at the moment of injury but the **duties assigned** at the moment of injury. This was accomplished by making the Act apply to employees "any **part** of whose duties * * * shall be the furtherance of interstate or foreign commerce" etc. In addition the place of the "borderline cases" (p. 50 ff) was clarified.

Men assigned generally to the handling of, and work upon, the vehicles of transportation, indiscriminately working with interstate and intrastate power and cars,—road crews, switching crews, and car men servicing and making running repairs on equipment then in use,—are, beyond question, now under the coverage of the Act whatever the character of their work at the moment of injury. Their duties include all of which part is interstate rolling equipment. The situation is one stated in the Senate report.

A step farther away are the men in back shops making heavy repairs on cars and power withdrawn from service for that purpose. The equipment is only withdrawn temporarily; such work "directly or closely and substantially" affects interstate commerce. (*Baizley Iron Works v. Span*, 281 US 222, 74 L ed 819.)[108] Where the equipment has been dedicated to the general service of the carrier, and will be returned to that service, a rule that it should take character from the general service to which it is dedicated is not far from the holding as to the bridge in *Pedersen*, pp. 49, 57 above. The difference is in the physical necessities dictating the way in which the work of repairs must be done rather than

108. Held, that repair work on a vessel which had steamed to port for necessary repairs "has direct relation to navigation or commerce" as opposed to work on a vessel not yet completed which does **not** have "any direct relation to navigation or commerce." (*Grant Smith-Porter Ship Co. v. Rohde*, 257 US 469, 66 L ed 321. And see *Sultan Ry. & T. Co. v. Dept. of Labor*, 277 US 135, 72 L ed 820.)

in the contribution made by the work of repair to furthering interstate transportation. This is another situation specified in the Senate report.

Still farther removed from the actual transportation and work that is practically a part of it is work with structures and devices not part of the main line such as depots, loading platforms and equipment, water towers, fuel oil tanks, coal chutes, sand houses, engine houses, shops, etc. Depots and loading docks and equipment are instrumentalities of the interstate journey of passengers or the interstate movement of freight itself. The platform from which a passenger boards his car contributes as much to his interstate journey as the red cap who carries his bag. The loading crane makes a part of the actual interstate movement. The buildings and structures used to service the vehicles of transportation are farther removed but the service they provide is essential to the movement itself and so close to it that even before the 1939 amendment this Court had been led in *Collins* and *Szarn* (p. 50 above), mistakenly, it is true, as it later said, to include under the Act work in the service they provide. The cases were borderline cases spoken of in the Senate report.

The Senate report shows that Congress was concerned with work directly contributing to the movement of interstate vehicles, with applying the Act to men whose work, viewed as a whole, —whose duty in part,—was interstate transportation or practically a part of it, and with removing "the uncertainty which exists in border-line cases". Coverage of the cases we have just noticed seems fairly within the stated aims. The activities are all of a kind peculiar to railroading.

But when we go beyond these and the other activities which had been held to fall within the Act before the 1939 amendment we are in areas not peculiar to carriers or

railroads, which do not further the transportation itself or "directly or closely and substantially" affect it and which, indeed, are not commerce in any sense. So the purchasing and stockpiling of supplies not earmarked for any definite use,[109] which could, as readily, be procured and held for possible railroad use by some independent business entity, and which may never be put to railroad use. (See p. 60 above.) Still farther away are manufacturing and new construction which, classically, are not commerce at all. If they affect transportation they affect it only remotely (cf. *Grant Smith-Porter Ship Co. v. Rohde*, note 198 above); no more "directly or closely and substantially" than the manufacture of any article which, ultimately, may move in interstate commerce or be used in interstate commerce or the building of a highway bridge over which a motorist from some other state may drive. (See p. 82 ff below.) We are in areas not traditionally part of railroading and are dealing with things which a railroad can do for itself or as readily have done by someone else. (Cf. *Donagall v. Spokane etc. Co.*, 207 F2d 843 (Circ 9), cert. den. 347 US 904, 98 L ed 1063.)

The conclusion suggested by placing § 1 in its historical and practical setting, is fortified by comparison of the deliberately selected restrictive language of the amendment (see p. 63 ff above) with the language of other federal statutes and by an analysis of the language of the 1939 amendment itself.

The National Labor Relations Act (of July 5, 1935, c. 372, 49 Stat. 449 (29 USC § 151 ff)) in § 10 (29 USC § 160) con-

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109. Cf. *Diamond Match Co. v. Ontonagon*, 188 US 82, 47 Led 394; *Am. Steel & Wire Co. v. Speed*, 192 US 500, 48 Led 538; *General Oil Co. v. Crain*, 209 US 211, 52 Led 754; *Bacon v. Illinois*, 227 US 504, 57 Led 615; *Atl. C. L. R. Co. v. Standard Oil Co.*, 275 US 257, 72 Led 270; *Nashville etc. Ry. v. Wallace*, 288 US 249, 77 Led 730.

ferred on the Board powers to prevent unfair labor practices "affecting commerce" [without the limiting words directly or closely and substantially] and broadly defined "affecting commerce" to mean "in commerce or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce" (§ 2 (7); 29 USC § 152 (7)).[110]

The year before the 1939 amendment to the FELA was adopted Congress was wrestling with the problem of hours of work and minimum wages in industry generally. Its labors resulted in the Fair Labor Standards Act of 1938, Act of June 25, 1938, c. 676, 52 Stat. 1060 (29 USC § 201 ff). We are concerned only with the original act because the amendments after 1939 would not reflect upon the use of language by Congress in the 1939 amendment to the FELA. Congress, in the Fair Labor Standards Act, exercising its power under the commerce clause, wanted not only to reach industries and employees in interstate commerce but also industries and employees in activities which, though not interstate commerce, were within the reach of the commerce power as affecting interstate commerce sufficiently to be subject to regulation by Congress in aid of interstate commerce. Accordingly, Congress in its findings and statement of policy described the area to be reached as "industries engaged in commerce or **in the production of goods for commerce**" (§ 2, 29 USC § 202), provided that the administra-

110. Quoting the provisions of the statute which we have just quoted *N. L. R. B. v. Fainblatt*, 306 US 601, 607, 83 Led 1014, 1019 said: "The Act on its face thus evidences the intention of Congress to exercise whatever power is constitutionally given to it to regulate commerce by the adoption of measures for the prevention or control of certain specified acts—unfair labor practices—which provoke or tend to provoke strikes or labor disturbances affecting interstate commerce."

tor should appoint an industry committee "for each industry engaged in commerce or **in the production of goods for commerce**" (§ 5, 29 USC § 205), provided that every employer should pay to each of his employees "who is engaged in commerce or **in the production of goods for commerce**" specified minimum amounts (§ 6, 29 USC § 206) and specified that no employer should, except as provided, "employ any of his employees who is engaged in commerce or **in the production of goods for commerce**" for longer periods than specified (§ 7, 29 USC § 207).

When, then, in 1939, Congress amended the FELA it had before it its own recent distinction between engaging in commerce and manufacturing and distinguished between commerce upon the one hand and the manufacture of wheels and new freight cars, i.e. "the production of goods for commerce" upon the other hand.[11] We suggest that while, perhaps, the construction of a wholly new retarder yard is not the production of "goods", if regard is had for the subject being dealt with in the FELA and the way in which it was dealt with in the 1939 amendment, no distinction is

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111. The cases have consistently applied the FLSA to employees engaged in manufacturing not because they were engaged in interstate commerce but "in the production of goods for commerce". *Alstate Const. Co. v. Durkin*, 345 US 13, 97 Led 745; *Powell v. U. S. Cartridge Co.*, 339 US 497, 94 Led 1017; *Schulte v. Gangi*, 328 US 108, 90 Led 1114; *Mabee v. White Plains Pub. Co.*, 327 US 178, 90 Led 607; *Armour & Co. v. Wantock*, 323 US 126, 89 Led 118, reh. den. 323 US 118, 89 Led 649. And transportation must be distinguished from production of goods for commerce (*Western Union T. Co. v. Lenroot*, 323 US 490, 504, 89 Led 414, 424 col. 2).

So Aranda making new wheels and Gilco building new cars were not engaged in commerce but in the production of goods for commerce. But more to the point, **the same is true of Southern Pacific Company**. It was not a common carrier by railroad engaged in interstate commerce but **a manufacturer producing goods for commerce**.

to be made between this and the "production of goods" in the most restricted sense of that phrase.

There is assistance in the railroad field. The Adamson Law, establishing the 8-hour day, Act of Sept. 3, 5 1916, c. 436, 39 Stat. 721 (45 USC § 65) was restricted to employees "actually engaged in any capacity in the operation of trains used for the transportation of persons or property on railroad". The Hours of Service Act of Mar. 4, 1907, c. 2939, 34 Stat. 1415 (45 USC § 61) defined employees as "persons actually engaged in or connected with the movement of any train." In dealing with labor disputes and strikes, under the commerce clause, the reach of Congress is very long and Congress intended to employ its long reach. "Employee" was defined to include "every person in the service of a carrier" performing work "defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission" (Railway Labor Act of May 20, 1926, c. 347, § 1, 44 Stat. 577 as amended June 7, 1934, c. 426, 48 Stat. 926, June 21, 1934, c. 691, 48 Stat. 1185, June 25, 1936, c. 804, 49 Stat. 1921; 45 USC § 151)

With the history of construction of the FELA of 1908 and with the Hours of Service Act and Adamson Law before it Congress rejected the narrower definitions and enlarged the definition of the Act of 1908 as construed. But it just as deliberately rejected the inclusion of employees engaged in manufacturing and new construction, employees engaged in the production of goods for commerce and the sweepingly all-inclusive language of the Railway Labor Act (45 USC § 151).[112]

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112. The coverage of all federal statutes is not the same. They do not all cover the permissible area. When Congress wants to go beyond the confined area itself and reach intertwined activities it is explicit. (*Kirschbaum v. Walling*, 316 US 517, 522, 86 Led 1638, 1647.) In the 1939 amendment to the FELA it was explicit in staying very close to the area of the kind of interstate commerce railroads engage in, interstate transportation.

Analysis of the language that Congress did use in the amendment of 1939, looked at by itself, is of assistance. The critical words are "furtherance of interstate or foreign commerce, or shall, in any way directly or closely and substantially, affect such commerce".

In a different context and against a different background "furtherance of interstate or foreign commerce" might comprehend any employee who in any respect contributed to the business welfare of an employer whose business was interstate transportation by railroad. The context and background permit no such sweeping construction and, as in *Davis*, p. 50 above and *Bezue*, p. 51 above, this language must be restricted to something closer to the heart of the business and to the transportation itself.[113] This is confirmed by the very fact that the second critical clause "or shall, in any way directly or closely and substantially affect such commerce" was added. If "furtherance of interstate or foreign commerce" were to be given the widest latitude the words would permit, as applied to a railroad employer, the second clause was completely unnecessary. (*Reed v. Penn. R. Co.*, 227 F2d 810, 812 (Circ. 3), cert. gr.) The only conclusion is the contrary one, that Congress thought the expression had narrow meaning and that "in any way directly or closely and substantially" affecting interstate commerce reaches something different from and beyond mere furtherance of interstate commerce.

The problem comes down to a determination of the reach of the words "in any way directly or closely and substantially, affect such commerce." A critical view of this clause shows designed limitations. To affect "in any way" is

113. Cf. *Carter v. Carter Coal Co.*, 298 US 238, 307, 80 L.ed 1160, 1186; *A. L. A. Schecter P. Corp. v. U. S.*, 295 US 495, 546, 79 L.ed 1570, 1585.

broader than to affect "in any way directly or closely and substantially". And what appears from a reading of the language is confirmed by the history of the legislative course of the amendment (see p. 64 above). What, then, do these words mean?

The problem must be dealt with in terms of the cases now before the Court. We anticipate the Court will not depart from the established tradition of not attempting the statement of universal formulas supposedly capable of mechanical application or depart from the established technique of resolving the problem of connotation of general words used in a board and diversified field only by the process of inclusion and exclusion of cases as they arise.[114] Granted that the work these men were doing would remotely reflect itself in interstate transportation carried on by their employer, in the ordinary and natural sense of the words it did this neither directly nor closely **and** substantially. Here, with the use of the disjunctive, Congress is using "closely and substantially" as an alternative for and substantial equivalent of "directly". One expression throws light upon the other. And "directly affecting" interstate commerce, when the activity is manufacturing or new construction, is not an expression of new or uncertain meaning and excludes manufacturing and new construction.

It would be useless to attempt to go into all of the ramifications of the idea of direct effect on interstate commerce. It is sufficient here that this Court has never departed from view that manufacturing and road and similar construction are local, do not directly affect interstate commerce, and (in the absence of controlling federal legislation) fall with-

114. Cf. *Kidd v. Pearson*, 128 US 1, 16, 32 Led 346, 348; *John Baizley Iron Works v. Span*, 281 US 222, 230, 74 Led 819, 821; *Davis v. Dept. of Labor*, 317 US 249, 253, 87 Led 246, 248.

in the competency of the states [manufacturing and processing: *Kid v. Pearson*, 128 US 1, 23, 32 L ed 346, 351: *Crescent Cotton Oil Co. v. Mississippi*, 257 US 129, 66 L ed 166; *U. S. v. E. C. Knight Co.*, 156 US 1, 16, 39 L ed 325, 330: *Capital City Dairy Co. v. Ohio*, 183 US 238, 245, 46 L ed 171, 175; road construction: *Field v. Barber Asphalt Paving Co.*, 194 US 618, 48 L ed 1142). So, "the mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture is ordinarily an **indirect** and **remote** obstruction to that commerce." (*United etc. Union v. Herkert etc. Co.*, 265 US 457, 474, 68 L ed 1104, 1109: See note 98 above.)

It is of course true that any such test of the power of Congress to regulate commerce under the commerce clause has been abandoned, if it were ever adopted, and Congress can, in proper circumstances, regulate matters purely local in aid of its protection of interstate commerce (*U. S. v. Darby*, 312 US 100, 85 L ed 609; *Parker v. Brown*, 317 US 341, 359, 87 L ed 315, 330; *Wickard v. Filburn*, 317 US 111, 121, 87 L ed 122, 132[115]). But we are not here concerned with the power of Congress. "This case presents the narrow question of what Congress did, not what it could do." (*Federal Trade Commission v. Keppel Bros.*, 312 US 349, 355, 85 L ed 881, 885. See p. 39 above.) When the matter is one of statutory construction the nature of the activity as local is of significance. *Wickard* pointed out that though the activity may be manufacturing is not material in deciding a question

115. The change in view is not as to the relation of manufacturing to commerce, or of the adoption of any view that manufacturing is other than local (*Darby* makes this clear), but is the full development of the doctrine that the power of Congress to regulate interstate commerce is plenary and carries with it power to do whatever is necessary to make the exercise of the power over interstate commerce practically effective, including the regulation of purely local affairs where necessary.

of Federal power, "that an activity is of local character may help in a doubtful case to determine whether Congress intended to reach it." (317 US at 124, 87 L ed at 135.) In our cases Congress expressed the intention not to reach manufacturing and new construction because it excluded activities which do not directly affect interstate commerce.

There are further different but related considerations to which this Court has given weight.

The work in which these 5 respondents were engaged was not peculiar to railroading. None of these men, in the ordinary course of his work, was subject to its peculiar hazards. Arapdas situation was not different from that of his opposite number in the Griffin Wheel Company. Gileo, Eufrazia and Eelk were doing the same things, in the same circumstances, as were Pullman Standard Car Manufacturing Company car builders. Moreno's conditions of work and changes of injury, negligent or non-negligent, were not different than if he had been employed by Morrison-Knudson who did the original grading (cf. *Dougall;* note 130, p. 95 below). There is nothing in the general policy or broad scheme of the FELA which is persuasive of withdrawing these men from the protection of the state compensation act and safety regulations and classifying them with men the core of whose work subjects them to the hazards of injury from moving railroad equipment. They are even less subject to these peculiar railroad hazards than the express messengers and sleeping-car porters whom Congress deliberately elected to exclude from coverage under the 1939 amendment (see p. 65 above).

The matter goes deeper. The FELA does not stand by itself. It is part only of a wider scheme dealing with railroad employee injuries. Both before and after it was adopted in 1908 Congress had concerned itself with the

safety of railroad workers in the so called Safety Acts (Acts of March 2, 1893, c. 196, 27 Stat. 531, March 2, 1903, c. 976, 32 Stat. 943 and April 14, 1910, c. 160, 36 Stat. 298; 45 U.S.C. §§ 1-16), the Ash Pan Act (of May 30, 1908, c. 225, 35 Stat. 476; 45 U.S.C. §§ 17-21) and the Boiler Inspection Act (of February 17, 1911, c. 103, 36 Stat. 913, June 7, 1924, c. 355, 43 Stat. 659 and March 4, 1915, c. 169, 38 Stat. 1192; 45 U.S.C. §§ 22-34). It is not only apparent from the provisions of these statutes considered apart that they all have the same purpose and design and deal generally with the same subject, the safety of railroad workers, but, for certain purposes at least, they are expressly related to the FELA by provisions of the latter Act. (§§ 3, 4, 45 USC §§ 53, 54.) These statutes are not only *in pari materia* (*B.&O. R. Co. v. Groeger*, 266 US 521, 528, 69 L ed 419, 424) but are so closely related that the Safety Acts and Boiler Inspection Act have been characterized by this Court as "substantially if not in form amendments to the Federal Employers Liability Act"; they are "supplemental to it, having the purpose and effect of facilitating employee recovery * * * The congressional purpose underlying the Boiler Inspection Act is basically the same as that underlying the Safety Appliance Acts and the Employers' Liability Act." (*Urie v. Thompson*, 337 US 163, 188 ff, 93 L ed 1282, 1302 ff.) Nor are these statutes unadorned. By § 5 of the Act of Mar. 2, 1893 (45 USC § 5), §3 of the Act of April 14, 1910 (45 USC § 12) and §5 of the Act of February 17, 1911 (45 USC § 28) Congress gave to the Interstate Commerce Commission the power by the adoption of rules, standards and instructions to make the application of the statutes more positive and effective,[116] *Urie* (337 US at 190, 93 L ed at 1304) put it this way:

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116. For example: Order under the Boiler Act requiring power operated reversing gear, initiated by the ICC, sustained. (*U. S. v. B. & O. R. Co.*, 293 US 454, 79 L.ed 587.) Order under the Safety Acts held to have the force of law. (*Atchison etc. Co. v. Scarlett*, 300 US 471, 81 L.ed 748.)

"Certain requirements of the Safety Appliance Acts, as for example the use of the automatic coupler, 45 USCA § 2, 10A FCA title 45, § 2, are made mandatory by express statutory language. Others, like those of the Boiler Inspection Act, simply outline a general standard which may be more specifically articulated in rules enunciated by the carriers subject to the approval of the Interstate Commerce Commission, 45 USCA § 28, 10A FCA title 45 § 28, or directly promulgated by the Commission, *Napier v. Atlantic Coast Line R. Co.*, 272, US 605, 611-613, 71 L ed 432, 438, 439, 47 S. Ct. 207, on the basis of proper findings. *United States v. Baltimore & O. R. Co.*, 293 US 454, 79 L ed 587, 55 S. Ct. 268. Violations of the Commission's rules are violations of the statute, giving rise not only to damage suits by those injured, *Lilly v. Grand Trunk Western R. Co.*, 317 US 481, 87 L ed 411, 63 S Ct. 347, supra, but also for money penalties recoverable by the United States. 45 USCA § 34, 10A FCA title 45, § 34."

The Interstate Commerce Commission has exercised the power delegated and under both the Safety Acts and the Boiler Inspection Act has adopted comprehensive and detailed rules, standards and instructions.

These statutes, and the I.C.C. rules and regulations, though they vary slightly in wording, apply to all common carriers engaged in interstate commerce by railroad and apply to all the described equipment of such carriers whether it is used in interstate commerce or intrastate commerce,—in this respect they are comprehensive. **But they apply only to rolling equipment,**—power units and cars. Their reach, in this regard, was not quite as long as the reach of the FELA of 1908 because they did not deal with protection of the employees engaged in maintenance and repair of the highway of commerce itself from the hazards of the work not arising out of the use or movement of rolling equipment, as for example, Pedersen. But the great

sources of injury to railroad workers were within their reach[117] and in some measure they paralleled the FELA and were part of its scheme. From the field covered, they excluded state regulation (*Napier v. Atlantic C. L. R. Co.*, 272 US 605, 71 L ed 432) so that within the field of their application the rules were uniform throughout the country, a workable result because the conditions dealt with were standardized. It is true that with the extended coverage of the FELA under the 1939 amendment the area within its reach and not within the reach of these other statutes has been expanded but it still remains that, **unless the coverage of the FELA is now unduly extended** they still cover the greatest source of injury—[118] and the whole federal scheme still has some unity. But the wider the extension of the FELA the greater are the gaps in coverage by safety orders.

But the states too, since 1908, have been concerned with the safety of workmen. They have not been satisfied to deal

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117. In Appendix B we set out accident data taken from tables in the 1954 report of the Interstate Commerce Commission, Bureau of Transport Economics and Statistics for the years 1930-1953.

About 95% of all deaths and well over 50% of all injuries to persons of all classes resulted from train operation accidents. (Table 1)

Over ⅔ of all deaths and since 1944 over 50% of all injuries to employees on duty resulted from train accidents. (Table 11)

In 1953 in the case of employees on duty 24.18% of the accidents resulting in death were nontrain and 44.81% of the injuries were nontrain and the remainder train. (Table 12)

The nontrain accidents are classified in Table 90.

118. When the coverage of the Act was enlarged to include enginemen, trainmen and switchmen although, at the moment of injury, they might not be engaged in interstate commerce it carried along with it into this field the Safety Acts and the Boiler Inspection Act.

It did not carry these statutes to men in the back shops making heavy repairs on power and cars withdrawn from service because of the wording of the statutes. For example the powerbrake provision is that it shall be unlawful for a carrier "to **use and employ** any locomotive engine" (45 USC § 1). The automatic coupler provision makes it unlawful for the carrier "to **haul or permit to be hauled or used on its lines** any car * * * not equipped with

with industrial injuries only by providing that compensation be paid when a man is hurt on the job. They have undertaken to promote safety in employment and to this end, sometimes by statutory provision, and sometimes by delegating the power to an appropriate administrative agency, they have laid down safety rules and standards for machinery and equipment and for conditions of work to promote the health and safety of the worker. California has done this. It has a comprehensive statutory scheme[119] fortified by extensive and detailed "orders"[120] adopted under the power conferred on the Division of Industrial Safety, the violation of which can lead to an award increased by one-half.[121] **These safety provisions and orders operate in the fields of work of railroad company employees not covered**

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couplers coupling automatically by impact" (45 USC § 2). Another provision is that it is unlawful "for any railroad company to use any car" not equipped with grabirons, etc. (45 USC § 4). The controlling provision of the Boiler Inspection Act makes it unlawful for any carrier "**to use or permit to be used on its line**" etc. (45 USC § 23).

The safety statutes have no provisions dealing with auxiliary facilities such as depots, loading docks and equipment, sand houses, water tower, interlocking towers, etc.

At the same time it excluded state safety regulations which had applied. See below.

119. The California Labor Code has general provisions imposing upon the employer the duty to see that the place of employment is made safe (§§ 6400-6406) and has special provisions covering construction of buildings (§§ 7100-7115), scaffolding (§§ 7150-7158), construction elevators (§§ 7200-7205), elevators (§§ 7300-7319) and tanks and boilers (§§ 7680-7692).

120. Outlined in Appendix C hereto.

121. The Division of Industrial Safety (referred to as division, § 6300) is given power to adopt general and special orders (§§ 6307, 6308, 6318, 6500 ff) and is given jurisdiction, among other things, over railroad shops (§ 6800). If an employer is guilty of serious and wilful misconduct any compensation award "shall be increased one-half" (§ 4553) and a knowing and wilful violation of a safety order constitutes such serious and wilful misconduct. (*Bethlehem Steel Co. v. I. A. C.*, 23 C2d 659, 145 P2d 583; *California Shipbuilding Corp. v. I. A. C.*, 27 C2d 536, 165 P2d 669; *California Shipbuilding Corp. v. I. A. C.*, 31 C2d 270, 188 P2d 27.)

by the Safety Acts and Boiler Inspection Act. But to the extent that the coverage of the FELA is extended their effectiveness is reduced. In addition compensation is payable under the California statute in the case of illness or disease, "occupational" or otherwise, "arising out of the employment" and the right to benefits in such cases, as in other cases, is not dependant upon a showing of negligence or other wrong doing.[122]

If it is now held that these men in manufacturing and new construction fall under the FELA the following will result:

1. The men have no rights under the state act and, in case of injury, can recover compensation only on proof of negligence of the employer which was a proximate cause of the injury (see p. 62 above) with the award subject to reduction in proportion to any negligence attributable to them (45 USC § 53).[123]

2. They will be deprived of any compensation for illness or disease arising out of the employment where

122. " 'Injury' includes any injury or disease arising out of the employment" (Lab. Cod. § 3208). This includes, of course, so called occupational diseases (*Colonial Ins. Co. v. I. A. C.*, 29 C2d 79, 172 P2d 884,—silicosis) but it is not restricted to such diseases and includes any illness or disease which has causal relation to the employment. It includes a disease peculiar to a region to which the employee is sent although his exposure to it is no greater than that of the residents of the area generally (*Pac. Emp. Ins. Co. v. I. A. C.*, 19 C2d 622, 122 P2d 570) and the aggravation of a prior heart condition although there was no unusual exertion (*Lumbermen's Mut. Cas. Co. v. I. A. C.*, 29 C2d 492, 175 P2d 823). For other examples of cases involving pre-existing conditions see *Pac. Indem. Co. v. I. A. C.*, 34 C2d 726, 214 P2d 530; *Fogarty v. Dept. Ind. Relations*, 206 Cal. 102, 273 P. 791; *Nat. Auto. etc. Co. v. I. A. C.*, 75 CA2d 677, 171 P2d 594 (hr. den. by Supreme Ct.); *Com. Cas. Ins. Co. v. I. A. C.*, 116 CA2d 901, 254 P2d 954 (hr. den. by Supreme Ct.); *Ass. Indem. Corp. v. I.A.C.*, 120 CA2d 423, 261 P2d 25.

123. As a partial defense it can never be eliminated by violation of state safety regulations and there can be no violation of any safety act since none applies. (See note 118 above)

no negligence of the employer can be shown (cf. note 122 above).

3. The various California safety provisions and orders will be completely without effect to increase the award in any amount in the event of knowing or wilful violation (see note 119 above) because the provision of the state statute for increase of the award in the event of serious and wilful misconduct can have no application. (*Chicago etc. Ry. Co. v. Devine*, 239 US 52, 60 L ed 140.)

4. The California safety provisions and orders will be robbed of effectiveness by being deprived of an important sanction, the imposition of a civil liability for their violation. Under the FELA negligence in the common-law sense must be proved without any aid from legislative acts except federal acts (which do not touch manufacturing or new construction). In a suit under the FELA state statutes are utterly without significance. Violation of them is meaningless and can not be shown.[124] (*Chesapeake & O. R. Co. v.*

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124. Under the FELA negligence means negligence in its common-law sense, unaffected by any rules of the state where the accident happened. "What constitutes negligence for the statute's purposes is a federal question, not varying in accordance with the differing conceptions of negligence applicable under state and local laws for other purposes. Federal decisional law formulating and applying the concept governs." (*Urie v. Thompson*, 337 US 163, 174, 93 L ed 1282, 1295.) This is but part of the broader rule that the application and effect of the statute is to be uniform throughout the country. (*Dice v. Akron etc. R. Co.*, 342 US 359, 361, 96 L ed 398, 403.) "The kind or amount of evidence required to establish" negligence under the Act "is not subject to the control of the several states." (*Chicago etc. R. Co. v. Coogan*, 271 US 472, 474, 70 L ed 1041, 1043), state statutes creating presumptions of negligence are inapplicable (*New Orleans etc. R. Co. v. Harris*, 247 US 367, 62 L ed 1167; *Yazoo etc. R. Co. v. Mullins*, 249 US 531, 63 L ed 754) and a state statute imposing a specific duty is wholly immaterial, "its violation has no bearing on the civil liability of a railway to its employees injured in interstate commerce, and that application of it" was error (*Chesapeake & O. R. Co. v. Stapleton*, 279 US 587, 73 L ed 861).

Stapleton, 279 U.S. 587, 73 L. ed. 861). The orders themselves have no penal sanctions and would be left as nothing but some proof in a prosecution for violation of the statute (Lab. Cod. § 6414). In this the men would have little interest since it had no bearing on their civil rights and the most active source of complaints and initiation of prosecutions would be gone. Since there are not and can not be any federal safety regulations in the field[125] (until Congress acts) the men will be very largely deprived of the benefits of safety rules, regulations and standards. It is submitted that Congress did not intend this result when it undertook to eliminate the moment of injury rule and the uncertainty in borderline cases in lines of work where it had in large measure provided safety regulations.

The effect here of excluding thoroughgoing state safety schemes by extending the FELA is new with the 1939 amendment. There was no problem in 1908 because there were no state compensation statutes and little by way of safety regulations.

5. There will be substituted for the simple and expeditious Commission procedure the slow, cumbersome and expensive common-law trial by jury method of resolving disputes.

If Congress, in a proper exercise of its powers, has dictated these results they must follow. But has it done so? If there is doubt should such an intention be imputed to it?

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125. There is no need to enlarge on the tremendous task it would be to work out a set of federal regulations to fit all the various activities in which a railroad might engage in the varying conditions in different parts of the country or argue out that this is not well suited to the peculiar competency of the I.C.C. because it is clear that in 1939 Congress did not have in mind any such attempt and the possibility could not reflect on what Congress intended by the 1939 amendment.

This court in *Federal Trade Commission v. Bunte Bros.*, p. 83 above, held "that in ascertaining the scope of congressional legislation a due regard for a proper adjustment of the local and national interests in our federal scheme must always be in the background" (312 US at 351, 85 L ed at 883). In making the appropriate adjustments, and in determining what Congress did in attempting to make the adjustment, what the state has done is not to be ignored. While it is manifest that enactment of a state statute "could not override the constitutional authority of the Federal Government" it is also true that in evaluating the situation "regard should be had to all the existing circumstances including the bearing and effect of any protective action to the same end already taken under state authority." (*Consolidated Edison Co. v. N.L.R.B.*, 305 US 197, 223, 83 L ed 126, 137.) In a closely related field this is exactly what has been done,—large regard has been paid to state workmen's compensation legislation. In wrestling with the very difficult problem of adjustment between state compensation acts and exclusive Federal authority in the maritime jurisdiction large regard has been paid to the protective measures taken by the states. (See *Davis v. Dept. of Labor*, 317 US 249, 87 L ed 246,[126] tracing the history of the attempts at adjustment and the difficulties encountered under *So. Pac. Co. v. Jensen*, 244 US 205, 61 L ed 1086 and permitting operation of a state compensation statute in a twilight zone that remains even after adoption of the Longshoremen's and Harbor Workers' Act, 33 USC § 901 ff. Cf. *Ahern*, note 100b, p. 63 above.)

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126. As this case, and the cases next to be dealt with show there is no hostility here or in Congress toward state compensation acts. The history of the attempts of Congress to deal with the problem presented by *Jensen*, briefly set out in *Davis v. Dept. of Labor*, shows that Congress first attempted a solution by legislation which would permit the state statutes to operate.

It is not without significance, then, in determining what Congress intended that California had a comprehensive labor code providing, for the 5 men whose cases are here, a comprehensive scheme of safety promotion and regulation and a comprehensive scheme of compensation for industrial injury unless their operation is excluded by the 1939 amendment of the FELA. In such circumstances "directly or closely and substantially" calls for no new, strange or strained construction. The phrase should be permitted to serve the purpose for which it was added. (See p. 64 above.)

From the twilight zone between maritime and land injury come two decisions which have decided bearing. They draw together the considerations just noticed. *Grant Smith-Porter Ship Co. v. Rohde*, 257 US 469, 66 L ed 321 held that an award could be made under a state compensation statute for a workman injured at work on new construction,—on a partially completed vessel lying in navigable waters,—because "neither Rohde's general employment, nor his activities at the time, had **any direct** relation to navigation or commerce." This case was followed in *Sultan Ry. & T. Co. v. Dept. of Labor*, 277 US 135, 72 L ed 820 where the work was booming logs on a navigable river and taking them from booms because "the employment, although maritime in character, pertains to local matters having **only an incidental** relation to navigation and commerce" and was distinguished in *John Baizley Iron Works v. Spun*, 281 US 222, 74 L ed 819 because there the work was work of repair on a completed vessel, the distinction we are urging, and heretofore established under the FELA, between repair and maintenance on one hand and manufacturing and new construction on the other.[127] Cf. *Hargington*, quoted in note 78 above.

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127. The same distinction was made and *Grant Smith-Porter Ship Co.*, above, followed in *Frankel v. Bethlehem-Fairfield Ship-*

But if we are wrong, and if the redefinition of "employee" has also served to disturb the concept of the employer who is engaging in commerce, settled by *Raymond* and *White*, pp. 59, 60 above, and not expressly tampered with by Congress, it can not be said that an employer manufacturing wheels and cars and building a wholly new retarder yard is acting as a common carrier or a carrier or a railroad.

VII. Decisions Under the 1939 Amendment.

So far as we are aware there have been published opinions in 90 actions in which application of the Act as amended has been considered.[128] Most of them are not remarkable. We believe none warrants the holding below. We briefly review them and comment on the cases relied on by the Supreme Court of California.

Opinions in 7 cases deal with whether the Federal Employers' Liability Act or the Longshoremen's and Harbor Workers' Compensation Act applied to a maritime injury of a railroad worker. The question is now settled by *Penn. R. Co. v. O'Rourke*, 344 US 334, 97 L ed 367 that the Federal Employers' Liability Act does not apply.[129] (See p. 70 above)

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yard, 132 F2d 634 (Circ. 4), cert. den. 319 US 746, 87 L ed 1702 where the accident happened after adoption of the Jones Act (46 USC § 688). Cf. *Maryland Casualty Co. v. Toups*, 172 F2d 542 (Circ. 5), cert. den. 336 US 967, 93 L ed 1119.

128. This does not include the cases here under review or *Desper* or any cases after August 11, 1939 where the accident happened before August 11, 1939 the effective date of the amendment, or any cases holding that the 1939 Amendment did not apply retroactively to accidents which happened before it went into effect.

The date of the accident does not appear in the opinion in *Mastrandrea v. Penn. R. Co.*, 132 F2d 318 (Circ. 3). An examination of papers in that case, sent to us by the Clerk of the Court of Appeals for the Third Circuit, shows it happened on February 24, 1939. The District Court opinion (43 F Supp. 546) shows that the accident in *Lukon v. Penn. R. Co.*, 131 F2d 327 (Circ. 3) happened Nov. 16, 1938.

129. *Nogueira v. N. Y. etc. R. Co.*, 281 US 128, 74 L ed 754, held that the Longshoremen's Act (44 Stat. 1424, 33 USC § 901 ff) pro-

Gaulden v. So. Pac. Co., 78 F Supp 691 (N.D. Cal.) aff'd 174 F2d 1022 (Circ. 9) on the grounds and for the reasons stated by the trial court, held that the FELA applied only to "railroading in its true sense" and not to supplying refrigerator cars and "protective service" and that a car service company was not a common carrier by railroad. It has been followed in other cases.[130]

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vided the exclusive remedy for a "railroad" employee moving freight by hand truck on a car float. It was followed in the case of a brakeman injured on a freight train ferry whose duty it was to set and release brakes and ride cars on and off the ferry in *Buren v. So. Pac. Co.*, 50 F2d 407 (Circ. 9), cert. den. 284 US 638, 76 L.ed.543. (See p. 70 above.) After the 1939 amendment of the Federal Employers' Liability Act the same result was reached in *Job v. Erie R. Co.*, 79 F Supp 698 (S.D. N.Y.), *Gussie v. Penn. R. Co.*, 1 NJ Super. 293, 64 A2d 244, cert. den. 338 US 869, 94 L.ed 533, and *Byrd v. N. Y. C. System*, 6 NJ Super. 568, 70 A2d 97. Then *Zientek v. Reading Co.*, 93 F Supp 875 (E.D. Penn.) held that the rule had been changed by the 1939 amendment of the FELA. The holding and reasoning were disapproved, and the court refused to follow, in *Rist v. Pittsburgh etc. Co.*, 104 F Supp 29 (N.D. Ohio) and *O'Rourke v. Penn. R. Co.*, 99 F Supp 506 (E.D. N.Y.). In *O'Rourke* the Court of Appeals for the Second Circuit reversed the District Court, 194 F2d 612. This court reversed the Court of Appeals. On the authority of that decision the Third Circuit reversed the District Court in *Zientek*, 220 F2d 183, cert. den. Oct. 10, 1955. *O'Rourke* was followed in *Scrinko v. Reading Co.*, 117 F Supp 603 (D.N.J.).

130. *Jones v. N. Y. C. R. Co.*, 182 F2d 326 (Circ. 6) express messenger; *Latsko v. Nat. Carloading Corp.*, 192 F2d 905 (Circ. 6), employee of a freight forwarder; summary judgment affirmed as to the freight forwarder upon the ground it was not a common carrier by railroad; denial of the motion of Erie R. Co. affirmed because there was an issue of fact whether its ownership of the stock and assets of National was a device to avoid liability so that § 5 of the Act applied; *Dougall v. Spokane etc. Ry. Co.*, 207 F2d 845 (Circ. 9), cert. den. 347 US 904, 98 L.ed 1063, employee of independent contractor doing work of maintenance and improvement on a railroad right-of-way; *Kelly v. Delaware etc. Com'n*, 85 F Supp 15 (E.D. Penn.), employee of independent painting contractor; *Moleton v. U. P. R. Co.*, 118 Utah 107, 219 P2d 1080, cert. den. 340 US 932, 95 L.ed 672, employee of P.F.E. the same car service company that was defendant in *Gaulden*.

Cf. Downs v. B. & O. R. Co., 345 Ill. App. 118, 102 NE2d 537 holding that Downs was not an employee of an independent contractor but was an employee of the railroad.

Of the remaining 76 cases, 9 held that the Federal Employers' Liability Act did not apply (see note 131, below), 66 held that it did apply, and 1 that a disputed matter of fact should have been submitted to the jury (*Avance v. Thompson*, below). Most, but not all, of these cases are collected in 10 ALR2d 1279 and the supplements to that note.

The 9 cases which refused to apply the FELA are briefly reviewed in the footnote.[131] The only one close to our facts is *Moser v. U. P. R. Co.*, 65 Idaho 479, 147 P2d 336 holding that the Act did not apply to construction of a new yard. *Marcno*, here under review, is the only case contra.[132] No case has held that manufacturing falls under the Act.

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131. 3 of the 9 cases which refused to apply the statute did so because, while it was shown that the employer was a common carrier by railroad engaged in interstate commerce, it was not made to appear the employee had any connection with the interstate aspects of the business (*Shoenfelt v. Penn. R. Co.*, 69 F Supp 728 (S.D. N.Y.); *Hallaway v. Thompson*, 148 Tex. 471, 226 SW2d 816; *Harper v. Ill. C. R. Co.*, 66 F Supp 751 (W.D. Ky.)). *Holl v. So. Pac. Co.*, 71 F Supp 21 (N.D. Calif.) refused to apply the statute to a clerk in the freight claims department. *Reed v. Penn. R. Co.*, 227 F2d 810 (Circ. 3) held the Act did not apply to a file clerk. *Moser v. U. P. R. Co.*, 65 Ida. 479, 147 P2d 336, refused to apply the act to one engaged in the construction of new track in line with the distinction between maintenance and new construction established by *Pedersen v. Delaware etc. R. Co.*, 229 US 146, 57 L.ed 1125; *Raymond v. Chicago etc. Ry. Co.*, 243 US 43, 61 L.ed 583; *N.Y.C. R. Co. v. White*, 243 US 188, 61 L.ed 667; *Minn. etc. R. Co. v. Nash*, 242 US 617, 61 L.ed 531. *Thomson v. Ind. Com'n*, 380 Ill. 386, 44 NE2d 19, cert. den. 318 US 755, 87 L.ed 1129, declined to apply the statute to a railroad policeman where it did not appear that his duties, at the time, had any direct or substantial relation to the movement of interstate shipments. *Lawrence v. Rutland R. Co.*, 112 Vt. 523, 28 A2d 488, cert. den. 317 US 693, 87 L.ed 555, held the Act did not apply to one removing weeds from a right of way not for railroad purposes but to comply with a state statute under which, if the railroad did not clear the weeds, the town could and could then recover the costs from the railroad. *Boyleston v. So. Ry. Co.*, 211 SC 232, 44 SE 2d 537, declined to apply the federal statute to a laborer who loaded and unloaded. It appears to have been decided incorrectly. *Reed* is before this court on certiorari.

132. In *Wacaster* and *Agostina*, note 137 below, the holdings were put upon the ground the work was maintenance not new construction and they are not authority for the proposition that new construction was brought under the Act by the 1939 amendment.

Of the remaining cases 16 involved members of crews handling rolling equipment,—10 involved switching crews and 6 involved road crews. In 2 of the switching crew cases[133] and 4 of the road crew cases[134] the FELA would have applied before the 1939 amendment because the men were actually handling interstate equipment.[135] In the remaining cases[136] the crews handled interstate and intrastate cars

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133. *McCall v. Pitcairn*, 232 Iowa 867, 6 NW2d 415, 421; *Pritt v. West Virginia N. R. Co.*, 132 WVa 184, 51 SE2d 105, cert. den. 336 US 961, 93 L.ed 1113. (Spotting an empty assigned for loading and movement in interstate transportation. In view of this most of the discussion seems wholly unnecessary.)

134. *Avance v. Thompson*, 320 Ill App 406, 51 NE2d 334, 387 Ill 77, 55 NE2d 57, cert. den. 323 US 753, 89 L.ed 603 (sent back for a new trial to submit to the jury the question whether a specified car was an interstate car being handled by the crew); *L. & N. R. Co. v. Stephens*, 298 Ky 328, 182 SW2d 447 (handling interstate empties; in view of the holding in *Wright*, note 69 above, which is overlooked, the somewhat extended discussion was unnecessary); *Griffith v. Gardner*, 358 Mo 859, 217 SW2d 519 (claimed from time to time handled interstate shipments and records for the day in question destroyed; held that an inference unfavorable to the railroad arose); *Beam v. B. & O. R. Co.*, 77 Oh St 419, 68 NE2d 159, 163.

135. In *Ernhart v. Elgin etc. Co.*, 405 Ill 577, 92 NE2d 96, the court said that in 3 other cases, *L. & N. R. Co. v. Potts*, *Taylor v. Lumaghi Coal Co.*, and *Ford v. L. & N. R. Co.*, all cited in note 136 just below, interstate equipment was being handled at the moment of injury but we have not so classified these 3 cases because we do not so read them.

136. Switching crews: *So. Pac. Co. v. I. A. C.*, 19 C2d 281, 120 P2d 887; *Lewis v. I. A. C.*, 19 C2d 284, 120 P2d 886; *Ernhart v. Elgin etc. Co.*, 337 Ill App 56, 84 NE2d 868, 405 Ill 577, 92 NE2d 96; *L. & N. R. Co. v. Potts*, 178 Tenn 425, 158 SW2d 729; *Ermin v. Penn. R. Co.*, 36 F Supp 936 (E.D.N.Y.); *Kach v. Monessen etc. Co.*, 151 F2d 400 (Circ. 3) (the facts are clear enough on this point but it is open to serious question, to say the least, that the employer was a common carrier); *Rogers v. N. Y. etc. R. Co.*, 328 Ill App 123, 65 NE2d 243; *Murphy v. B. & M. R.*, 319 Mass 413, 65 NE2d 923 (interstate commerce "agreed or substantially admitted").

Road crews: *Taylor v. Lumaghi Coal Co.*, 252 Mo 1212, 181 SW2d 536 (road crew of an interstate train doing local switching unconnected with the train movement); *Ford v. L. & N. R. Co.*, 355 Mo 362, 196 SW2d 163.

indiscriminately and as a regular part of their duties. By its terms, since part of their duties was in interstate commerce, the Act applied. This class of case is one specially mentioned in the Senate report. (See p. 66 above.)

Twenty one were cases of men clearing and keeping open for traffic, maintaining, rehabilitating and repairing the highway of interstate commerce itself,—tracks, switches, bridges, etc.[137] Under *Pedersen v. Delaware etc. R. Co.*, 229

137. *Robinson v. Penn. R. Co.*, 214 F2d 798 (Cir. 3); *Copley v. L.A.C.*, 19 C2d 287, 120 P2d 879; cert. den. 316 US 678, 86 L ed 1752; *Prader v. Penn. R. Co.*, 113 Ind App 518, 49 NE2d 387; *Pigue v. Baldwin*, 154 Kan 708, 121 P2d 183; *Patsaw v. Kansas etc. Ry. Co.*, 56 F Supp 897 (W.D.La.); *Atl. C. L. R. Co. v. Meeks*, 30 Tenn App 529, 208 SW2d 355; cert. den. 333 US 827, 92 L ed 1112; *Gulf etc. Co. v. Waterhouse*, (Tex. Civ. App.), 223 SW2d 654; *Riley v. West Virginia etc. Co.*, 132 WVa 208, 51 SE2d 119, cert. den. 336 US 961, 92 L ed 1113; *Bailey v. Cent. Vt. R. Co.*, 113 Vt 433, 35 A2d 365; *Dillard v. Thompson*, 5 FRD 26; *Mo. Pac. R. Co. v. Fisher*, 206 Ark 705, 177 SW2d 725; *St. Louis etc. Ry. Co. v. Wacaster*, 210 Ark 1080, 199 SW2d 948; *Agostino v. Penn. R. Co.*, 50 F Supp 726 (E.D.N.Y.); *Skanks v. U. P. R. Co.*, 155 Kan 584, 127 P2d 431; *Rainwater v. Chicago etc. Co.*, 207 La 681, 21 S2d 872; *Brainard v. Atchison etc. Co.*, 87 F Supp 921 (D.Kan.); *Harris v. Mo. Pac. R. Co.*, 158 Kan 679, 149 P2d 342; *Armstrong v. Mo. etc. Co.*, (Tex. Civ. App.) 233 SW2d 942; *Walden v. Chicago etc. Ry. Co.*, 411 Ill 378, 104 NE2d 240; *B. & O. R. Co. v. Rodeheaver*, 197 Md. 632, 81 A2d 63; *Ericksen v. So. Pac. Co.*, 39 C2d 374, 246 P2d 642.

Few of these cases call for comment. We briefly note those that had any slightly unusual features. *Robinson* was resurfacing a highway traffic bridge over the railroad track. This seems as clearly within the Act as repair of a railroad bridge over an underpass (cf. *Pedersen*, above) or the work of a crossing watchman (*DiDonato*, p. 57 above). The other ground the court notices is highly questionable. *Prader*, a section hand was hurt when he was sent from the job to get a rule book. *Patsaw* was injured while going to the tool house for tools. *Meeks* was injured in a bunk car provided by the employer and though he was not working he was subject to call. In *Wacaster* a short section of main line was being double tracked and in *Agostino* new rail was being laid to shorten the line. In both cases the work was treated as maintenance of main line. In *Skanks*, *Rainwater* and *Brainard Cases* materials were being prepared for repair work to which they had been committed. In *Brainard* the work was that of assembling switches and frogs which were usually stock-piled

US 146, 57 L ed 1125 (p. 57 above), and *N. Y. C. R. Co. v. Porter*, 249 US 168, 63 L ed 536 these cases would have fallen under the Act before the 1939 amendment.[138]

Seven cases involved work on permanent structures, permanently committed to the general business of the railroad, both interstate and intrastate.[139] Such cases, before the 1939 amendment, were borderline cases, to say the least. (See p. 50 above and following.) Cases now holding that the broadened area of application of the Act includes such work hardly call for comment.[140]

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but the Court was careful to point out that the stock-pile had been exhausted and that at the time the employee was working on switches and frogs which would be shipped for immediate use. In *Harris* and *Armstrong* the work was cleaning up and policing generally the railroad premises. *Rodeheaver* was a flagman (cf. DiDonato, p. 57 above).

Ericksen was inspecting ties which were to be sent out on the line as replacements.

138. *Pedersen*, repair of bridge,—taking bolts or rivets to bridge to be used that night or next day on bridge.

139. *Jordan v. B. & O. R. Co.*, 135 WVa 183, 62 SE2d 806; *Great Northern Ry. Co. v. Ind. Com'n*, 245 Wis 375, 14 NW2d 152; *Scarborough v. Penn. R. Co.*, 154 Pa Super. 129, 35 A2d 603; *Zimmermann v. Scandrett*, 57 F Supp 799 (E.D. Wis.); *Wills v. Terminal R. Ass'n*, 239 Mo App 1144, 205 SW2d 942; *So. Pac. Co. v. Romine*, 75 Ariz 98, 251 P2d 908, cert. den. 345 US 970, 97 L ed 1387; *Downs v. B. & O. R. Co.*, 345 Ill App 118, 102 NE2d 537. In the *Scarborough Case* the plaintiff was doing a temporary job, installing a light in the station building. His regular work was that of a signal maintainer and, of course, part of his duties was maintenance of the main line system. *Romine* was a member of a B & B gang whose regular work was general building maintenance, especially main line bridges. The gang was on its way to complete an extension to a pump house. *Downs* was repairing ore unloading equipment.

140. The cases in the last two classes mentioned are to be distinguished from **new** construction. *Moser v. U. P. R. Co.*, 65 Ida 479, 147 P2d 336 held the Act, as amended, did not apply to new construction.

The Senate report states that one object of the amendment was to include borderline cases. (See p. 66 above.)

Eighteen cases were of employees engaged in servicing the equipment used to transport interstate shipments. In 2 of the cases[141] the locomotive was assigned to interstate work and before the 1939 amendment the Act would have applied.[142] But before the amendment it had been held that if equipment was withdrawn from service for repairs, etc., the Act did not apply. The remaining 16 cases in this class,[143] by reason of the 1939 amendment, now apply the Act. These cases represent an extension of the Act but an extension well within its terms and belong to a class picked out and specified in the Senate Committee report. It cannot be said of these cases that there is any unwarranted extension,—certainly part of the duties of these employees is the furtherance of interstate transportation. Rolling equipment committed to the general business of the railroad and used indiscriminately in interstate and intrastate com-

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141. *Williams v. Chicago etc. Ry. Co.*, 155 Kan 813, 130 P2d 596, and *Wright v. N. Y. C. R. Co.*, 263 App. Div 461, 33 NYS2d 531 aff'd 288 NY 719, 43 NE2d 97, cert. den. 317 US 668, 87 L ed 537.

142. *N. Y. C. R. Co. v. Marone*, 281 US 345, 74 L.ed 892; *Chicago etc. R. Co. v. Bower*, 241 US 470, 60 L.ed 1107; *B. & O. R. Co. v. Kast*, 299 Fed 419 (Circ. 6), cert. den. 266 US 613, 69 L.ed 468.

143. *So. Pac. Co. v. I. A. C.*, 19 C2d 271, 120 P2d 880 (the court was careful to point out that new cars were not built in the shop); *So. Pac. Co. v. I. A. C.*, 19 C2d 283, 120 P2d 888; *McFadden v. Penn. R. Co.*, 130 NJL 601, 34 A2d 221; *Maxie v. Gulf etc. Co.*, 356 Mo 642, 202 SW2d 904, 358 Mo 1100, 219 SW2d 322, cert. den. 338 US 823, 94 L ed 499; *So. Pac. Co. v. I. A. C.*, 88 CA2d 569, 199 P2d 364; *Trucco v. Erie R. Co.*, 353 Pa 320, 45 A2d 20, cert. den. 328 US 843, 90 L ed 1618; *Edwards v. B. & O. R. Co.*, (1942) 131 F2d 366 (Circ. 7); *Shelton v. Thomson*, 148 F2d 1 (Circ. 7,—crane operator in a shop using crane to lift wheels treated as "one who is engaged with others in the process of repairing cars"); *Skidmore v. B. & O. R. Co.*, 167 F2d 54 (Circ. 2); *Bretsky v. Lehigh V. R. Co.*, 156 F2d 594 (Circ. 2); *Baird v. N. Y. C. R. Co.*, 299 NY 213, 86 NE2d 567; *Wheeler v. Mo. etc. Co.* (Mo. App.) 205 SW2d 906; *Williams v. Chicago etc. Co.*, (1942) 155 Kan 813, 130 P2d 596; *Kordic v. Penn. R. Co.*, 46 Pa. D. & C. 607; *So. Pac. Co. v. Libbey*, 199 F2d 341 (Circ. 9), *Peresipka v. Elgin etc. R. Co.*, 217 F2d 182 (Circ. 7).

merce can hardly be distinguished from the highway of commerce itself, upon which it rolls, and permanent structures. (See p. 75 above.)

Two cases were of a clerk and watchman concerned with cars moving in interstate commerce.[144] Before the amendment they were under the Act when working with interstate cars.[145]

There are 3 other cases. *Ketlner v. Ind. Com.*, 258 Wis 615 46 NW2d 833 denied an award of compensation under the state statute for the death of a freight solicitor. *Straub v. Reading Co.*, 220 F2d 177 (Circ. 3) applied the FELA to an assistant chief timekeeper. He had supervisory duties which included seeing that men operating trains were properly paid and that the Hours of Service Act was not violated. He was said to be no mere clerk as in *Holl* (see note 131) and the court said "this is definitely a borderline case". (It so treated it in *Reed v. Penn. R. Co.*, 227 F2d 810 (Circ. 3).) These cases are open to serious question. *O'Donnell v. Penn. R. Co.*, 122 F Supp 899 (S.D. N.Y.) held that the employee could sue for damages resulting from negligence of a physician employed by the railroad. The case overlooks the fact that in supplying medical attention the employer is not acting as a common carrier or a railroad even if this can be classified as interstate commerce.

Of these cases the Supreme Court of California relied on 11:

Ericksen v. So. Pac. Co., 39 C2d 374, 246 P2d 642, *Brainard v. Atchison etc. Co.*, 87 F Supp 921 (D. Kan.) and

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144. *Albright v. Penn. R. Co.*, 183 Md. 421, 37 A2d 870, cert. den. 323 US 735, 89 L ed 589 (checking seals and guarding shipments; cf. contra *Thomson v. Ind. Com'n*, 380 Ill 386, 44 NE2d 19, cert. den. 318 US 755, 87 L ed 1129—ejecting trespasser; see note 131 above); *Bowers v. Wabash R. Co.*, (Mo. App.) 246 SW2d 535 (handling interstate waybills).

145. *Seale*, p. 57 above and *Rosenbloom*, p. 57 above.

Agostino v. Penn. R. Co., 50 F Supp 726 (D.C. N.Y.) (all cited in note 137 above) had to do with maintenance of the main line. *Agostino* was working on a section of 8,000 feet of track intended as a revision of the existing line which would shorten it by 670 feet, eliminate 5 curves and reduce grade. The case was determined by looking solely at the situation of the plaintiff[146] and treating the work as that of maintenance, **not** new construction.[147] *Brainard* was assembling switches and frogs then definitely earmarked for immediate shipment for use on the existing line, and the case was decided on the authority of *Pederson*, p. 57 above,[148] and *Ericksen* was inspecting ties and "some were immedi-

146. The court said: "The sole question presented—Was the plaintiff engaged in interstate commerce within the purview of the Federal Employers' Liability Act as amended by the act of Congress approved August 11, 1939?" It fails, entirely, to consider whether the employer was acting as a railroad or a carrier.

147. Whether the court was right or wrong in its classification of the facts it is clear that it was not deciding that new construction fell under the Act as amended. It said (p. 729): "The court is not required here to determine whether a person engaged in erecting a new project, intended to be used in interstate commerce, was engaged in interstate commerce, nor to determine whether or not a person working on a new project, such as the construction of a new railway, passenger station or freight house intended to be used in interstate commerce, is actually engaged in interstate commerce. Here the plaintiff was working on a revision of track alignment which was an improvement of the existing highway of interstate highway. * * * The conclusion seems inescapable that the construction work, while new, was only an improvement such as an extension, alteration, replacement or repair and, therefore, the plaintiff was engaged in interstate commerce." But was the employer acting as a railroad or a carrier?

148. The assembled switches and frogs were usually stockpiled at the rail mill. At the time Brainard was injured "the stockpile at defendant's rail mill was depleted * * * and it was necessary to ship such items immediately upon assembly to fill current requisitions." The court quotes from *Pederson*, and holds that Brainard's work was interstate commerce under the rationale of *Pederson*. If so the 1939 amendment had no bearing.

ately transported across state lines and placed in tracks carrying interstate commerce". Like *Pedersen* (p. 57 above) each seems to have been performing "a minor task which was essentially a part of the larger one" of maintenance of track then in use. That the task was performed at a distance from the point where maintenance of the line work itself was being done is of no consequence. The test is not geographical proximity but proximity in the series of steps to the finished job of track maintenance.

Ermin v. Penn. R. Co., 36 F Supp 936 (E.D. N.Y.) and *Lewis v. I.A.C.*, 19 C2d 284, 120 P2d 886 (note 136 above) were actions brought by brakemen. The facts showed, beyond question, that they worked indiscriminately with interstate and intrastate equipment so that it would be immaterial, if that were the fact, whether at the moment of injury they were working only with intrastate equipment.

In *Wright v. N. Y. C. R. Co.*, 263 App Div 461, 33 NYS2d 531, aff'd 288 NY 719, 43 NE2d 97, cert. den. 317 US 668, 87 L ed 537, (note 141 above) plaintiff, acting as a boiler inspector, was making minor repairs on an interstate locomotive.[149]

In *Shelton v. Thomson*, 148 F2d 1 (Circ. 7),[150] *So. Pac. Co.*

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149. In *Baird v. N. Y. C. R. Co.*, 299 NY 213, 86 NE2d 567, 569 the court referred to its decision in *Wright*, treated that case as one of work on an interstate locomotive, or at least a case of a man whose work was ordinarily on interstate locomotives so that it was immaterial what he was doing at the precise moment of injury, and said: "Accordingly, it was not necessary in the *Wright Case*, supra, for us to decide the question we have before us here, that is, whether the repair of a locomotive ordinarily used in, but presently withdrawn from, interstate transportation brings the worker under the amended law."

150. A crane operator of a "crane being used to lift wheels and other supplies, which were in turn used in the repair of defendant's freight cars." He was characterized as "one who is engaged with others in the process of repairing the car".

v. I.A.C., 19 C2d 283, 120 P2d 888, and *Trucco v. Erie R. Co.*, 353 Pa 320, 45 A2d 20,[151] cert. den. 328 US 843, 90 L ed 1618 (all cited in note 143 above) the men were making repairs on rolling equipment devoted, indiscriminately, to interstate and intrastate service and temporarily withdrawn from service. The cases fall into one of the classes specified in the Senate report. (See p. 100 above.)

In *Jordan v. B. & O. R. Co.*, 135 WVa 183, 62 SE2d 806[152] and *Wills v. Terminal R. Ass'n*, 239 Mo App 1144, 205 SW2d 942,[153] (both cited in note 139 above) the injured men were working upon adjuncts of structures permanently devoted to the general business of the railroad and present no exceptional features. (See p. 76 above.)

VII. Mitchell v. C. W. Vollmer & Co., 349 US 427, 99 L ed 1196.

Mitchell was a proceeding by the Secretary of Labor to enjoin asserted violations of the Fair Labor Standards Act (52 Stat 1060 as amended, 63 Stat 910, 29 USC § 201 ff). The work was construction of an earth embankment and concrete platform for a lock, a unit of the Gulf Intracoastal

151. Claimant was working in a blacksmith shop of the railroad making straphangers. The shop made repair parts for locomotives and the straphangers were used as replacement parts. He was making parts essential "for the repair and maintenance of defendant's locomotives" and, as in the cases of *Pedersen*, *Brainard* and *Ericksen* was engaged in a minor task which was simply part of the larger one.

152. A carpenter whose "work included repair of bridges, water tanks, coal houses, water stops, pump stations, roundhouses, laying tile, masonry and other labor connected with the maintenance of a railroad system." When injured he was working on a sewer for a roundhouse "to replace the old line".

153. A "sheet metal worker, * * * helping to install a pipe ventilator through the roof of a building used for forging iron parts, which iron parts were used in the repair of box-cars moving in interstate commerce."

Waterway. The lock was designed to furnish better passage into and across the Mississippi than was provided by the existing Harvey Lock and Canal. The question was whether those working on the lock were engaged in commerce within § 7 of the Act. The lock was designed to serve as an alternate route to the Harvey Lock and Canal. It was urged, on the authority of *Raymond v. Chicago etc. R. Co.*, 243 US 43, 61 L ed 583 (p. 59 above), that the workmen were not engaged in such commerce; that the lock was new construction. The majority said, speaking of *Raymond*:

> "We do not think that case should control this one. **We are dealing with a different Act of another vintage** —one that has been given a liberal construction from *A. B. Kirschbaum Co. v. Walling*, 316 US 517, 86 L ed 638, to *Alstate Constr. Co. v. Durkin*, 345 US 13, 97 L ed 745."

It was held that the Fair Labor Standards Act applied and that holdings under the FELA were to be distinguished.

In holding that *Raymond*, decided under another statute, was not necessarily controlling, and that what was commerce under one act was not necessarily the same as commerce under another, the court was proceeding in line with what it had said in *McLeod v. Threlkeld*, 319 US 491, 495, 87 L ed 1538, 1542, which it cites. *McLeod* had said:

> "There is no single concept of interstate commerce which can be applied to every federal statute regulating commerce."[154]

For this the court referred, in *McLeod*, to the *A. B. Kirschbaum Co. Case*, 316 US 517, 520, 86 L ed 1638, 1646 which is also cited in *Mitchell*.

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154. Dealing with an Act of Congress regulating interstate commerce and its meaning (as distinguished from the power of Congress) *Fed. Trade Com'n v. Bunte Bros.*, 312 US 349, 353, 85 L ed 881, 884 said: "Translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business."

Mitchell carries no disapproval of *Murphey v. Reed*, but to the contrary also distinguishes that case by saying (note 2 to the *Mitchell* opinion):

> "The construction work held in *Murphey v. Reed*, 335 US 865, 93 L ed 410, not to be under the Act, was the building of a Navy Base, not the improvement of a facility or instrumentality of interstate commerce."

The cases now here are not under the Fair Labor Standards Act but are under the FELA under which *Raymond* was decided and under which, upon the authority of *Raymond*, the employer in manufacturing cars and wheels and constructing a new retarder yard was not engaged in commerce or in interstate commerce. And this is true even if to these activities the Fair Labor Standards Act applied (see the *A. B. Kirschbaum Case* at the place cited just above). *Mitchell* itself makes the controlling and authoritative distinction.

The distinction appears when the statutes are compared. In the light of the whole purpose and scheme of the Fair Labor Standards Act construction of a new lock, for a predetermined use as part of an interstate waterway in interstate commerce can, without a wrench, be assimilated to "production of goods for commerce",—it is production for commerce if not of "goods",—expressly covered by the Act. By the same token construction of a new retarder yard is to be assimilated to manufacture of cars and wheels,—production of goods,—which is just as clearly (and deliberately) **not** covered by FELA as inappropriate in an act regulating **railroading.**

But whether the employer, in the 5 cases at bar, in making wheels, building cars and constructing a new yard was engaged in commerce or interstate commerce and the work of the employees directly or closely and substantially affected

interstate commerce, the defendant-employer was not acting as a common carrier and was not acting as a railroad. Upon this *Mitchell v. Vollmer & Co.* in no way touches.

CONCLUSION

These cases can be disposed of readily and shortly upon the ground that petitioner, the defendant-employer, was acting neither as a carrier nor as a railroad.

But there is a second ground of decision: The plaintiff-employees were not furthering, or directly or closely and substantially affecting, interstate commerce, i.e., interstate transportation or work so closely connected with it as to be practically a part of it. We suggest, with deference to the Court's usual policy of not going farther than is necessary to dispose of the case in hand, that this second ground should not be ignored and it is believed it must be considered in *Reed v. Pennsylvania Railroad Company* which is now before the Court.

The Federal Employers' Liability Act is one to which appeal is made constantly. In San Francisco alone, in state and federal courts, frequently as many as 5 or 6 FELA cases come to trial a week. In many the serious question is whether the federal or a state act applies. Administration of the federal Act has been left to the courts and, of necessity, the great bulk of the questions warranting review on appeal must be left to the United States Courts of Appeals and state courts of review. For them the problem, which act applies, will not be eliminated by a loose construction of "furtherance" of interstate commerce or "directly or closely and substantially" affecting such commerce. It will always be necessary to draw some line. No such simple solution of the problem of fixing the boundary between the field of the FELA and the field of the state compensation statutes can

be found as warrants ignoring that Congress deliberately elected to limit the Act as amended to employees, part of whose duties directly affects the instrumentalities of rail movement itself. With deference, the lower courts often seem not to have appreciated this; seem not to have appreciated that there are some real guides to the meaning of the Act; seem to have reached their results, not by rationalization of the statutory, juridical and factual elements involved, but by some sort of "intuitive" process, apparently satisfied that this is being "liberal" though it can serve to deprive an injured man, or the widow and children of one who has been killed, of any relief. It is believed that for their guidance an exposition, fuller perhaps, than is necessarily called for to dispose of these cases, is appropriate.

As to the cases in hand, it is respectfully submitted that the judgments of the Supreme Court of California must be reversed.

Dated at San Francisco, California, this 13th day of March, 1956.

ARTHUR B. DUNNE
HORACE B. WULFF
Attorneys for Petitioner
Southern Pacific Company

APPENDIX A

Calendar No. 712

76TH CONGRESS—*1st Session*

SENATE

REPORT No. 661

AMENDING THE EMPLOYERS' LIABILITY ACT

JUNE 22, 1939.—ORDERED TO BE PRINTED

Mr. NEELY, from the Committee on the Judiciary, submitted the following

REPORT

[TO ACCOMPANY S. 1708]

In pursuance of an order of reference made by the Senate on the 6th day of March 1939, the Committee on the Judiciary have conducted hearings on Senate bill No. 1708, to amend section 51 of chapter 2, title 45, of the Code of Laws of the United States of America, and in the light of the hearings have adopted a substitute therefor and report the substitute with the recommendation that it be passed. The substitute, in which the proposed amendments to the existing law are in italics, is as follows:

A BILL To amend the Employers' Liability Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections 1, 4, and 6, chapter 149 (35 Stat. 65, Act of April 22, 1908), are hereby amended so as to read as follows:

"Section 1. That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and

Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parent; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"*Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth, shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled 'An Act relating to the liability of common carriers by railroad to their employees in certain cases' (approved April 22, 1908), as the same has been or may hereafter be amended.*

[Here are set out other proposed amendments.]

The bill as introduced was intended to broaden the application of the act to include express, freight forwarding, and sleeping-car companies. Upon the hearings it was clearly shown that there is neither necessity nor demand for the inclusion of these companies in the act. Therefore, they have been excluded from the substitute.

OBJECTIVES OF THE BILL

It is the aim of the bill to amend the Employers' Liability Act in three particulars:

1. It broadens and clarifies the law in its application to employees who may be killed or injured while in the service of a railroad company engaged in interstate or foreign commerce.

2. It abrogates the defense of assumption of risk in cases where injury or death is caused by the negligence of a carrier and makes the doctrine of comparative negligence applicable instead.

3. It prohibits the promulgation or enforcement of rules which penalize railroad employees for giving information concerning accidents to the injured person or his representative.

AMENDMENT TO SECTION 1

This amendment is intended to broaden the scope of the Employers' Liability Act so as to include within its provisions employees of common carriers who, while ordinarily engaged in the transportation of interstate commerce, may be, at the time of injury, temporarily divorced therefrom and engaged in intrastate operations.

The question whether an employee, at the time of his injury, is engaged in interstate or intrastate commerce is frequently difficult of determination. Under the rule laid down by the Supreme Court of the United States, an employee of a railroad company who may be injured must be found to have been engaged, at the time of the infliction of the injury, "in transportation or work so closely related to it as to be practically a part of it" (*Shanks v. D., L. & W. R. R.*, 239 U.S. 556).

In order to prove interstate transportation, if the question is at all obscure, it is necessary to procure the records of the carrier to show that the train, or the car upon which the employee was working, at the time of the injury, contained some commodity, which was being transported in interstate commerce, or, if the car be empty, it is necessary to prove by the records of the company that the car was then en route in an interstate movement.

As a result of the uncertainty which exists in border-line cases, there have been many instances in which suits were commenced and prosecuted to final determination only to develop the fact that the claimant had chosen the wrong remedy, or sued in the wrong court, and during the acquirement of this information the statute of limitations ran against the claimant under the law applicable to the case and no recovery could be had.

Railroad men are frequently injured while moving or working upon cars or engines which have been temporarily withdrawn from interstate commerce and which were, just before or just after the injury, used in such commerce. In railroad switching service particularly men may be engaged in interstate and intrastate commerce intermittently several times during a single tour of duty.

The adoption of the proposed amendment will to a very large extent, eliminate the necessity of determining whether an employee, at the very instant of his injury or death, was actually engaged in the movement of interstate traffic. If any part of the employee's duties (at the time of his injury or death) directly, closely, or substantially affected interstate or foreign commerce, the claimant would be considered entitled to the benefits of the act.

The preponderance of service performed by railroad transportation employees is in interstate commerce. As to

those who are constantly shifting from one class of service to another, the adoption of the amendment will provide uniform treatment in the event of injury or death while so employed.

[The remainder of the report deals with the other proposed amendments.]

APPENDIX B

The following are taken from Accident Bulletin No. 122 of the Interstate Commerce Commission, Bureau of Transport Economics and Statistics, for the Calendar Year 1953.

Published by the Government Printing Office in 1954

TABLE 1.—Casualties to persons of all classes, by kind of accident, years 1930-53.

PERIOD	Number killed: In accidents in train operation	Number killed: In non-train accidents	Number killed: In all kinds of accidents
1930-34 (av.)	4,800	242	5,042
1935-39 (av.)	4,725	218	4,943
1940-44 (av.)	4,708	223	4,931
1946-50 (av.)	3,621	179	3,800
1944	4,528	253	4,781
1945	4,465	226	4,691
1946	4,167	195	4,362
1947	3,944	221	4,165
1948	3,572	196	3,768
1949	3,163	144	3,307
1950	3,257	141	3,398
1951	3,207	151	3,358
1952	2,793	133	2,926
1953	2,805	125	2,930
	Number injured		
1930-34 (av.)	19,130	14,947	34,077
1935-39 (av.)	17,569	13,401	30,970
1940-44 (av.)	26,897	20,514	47,411
1946-50 (av.)	25,300	16,552	41,852
1944	35,099	26,128	61,227
1945	35,769	25,712	61,481
1946	30,286	21,721	52,007
1947	25,698	17,393	43,091
1949	19,603	12,508	32,111
1950	21,769	11,486	33,255
1951	22,607	11,830	34,437
1952	19,216	10,770	29,986
1953	18,533	10,666	29,199

TABLE 11.—Casualties to employees on duty, by kind of accident, years 1930-53.

PERIOD	Number killed		
	In accidents in train operation	In non-train accidents	In all kinds of accidents
1930-34 (av.)	486	146	632
1935-39 (av.)	446	128	574
1940-44 (av.)	689	147	836
1946-50 (av.)	423	119	542
1944	803	175	978
1945	736	156	892
1946	541	131	672
1947	547	162	709
1948	434	134	568
1949	321	82	403
1950	271	87	358
1951	311	84	395
1952	278	74	352
1953	232	74	306
	Number injured		
1930-34 (av.)	8,646	13,007	21,653
1935-39 (av.)	7,576	11,417	18,993
1940-44 (av.)	16,096	18,204	34,300
1946-50 (av.)	15,490	14,266	29,756
1944	23,758	23,572	47,330
1945	24,295	22,990	47,285
1946	19,128	19,197	38,325
1947	18,535	17,197	35,732
1948	15,946	14,911	30,857
1949	11,628	10,476	22,104
1950	12,216	9,547	21,763
1951	13,564	9,779	23,343
1952	11,673	8,863	20,536
1953	10,699	8,686	19,385

TABLE 12.—Distribution of casualties to employees on duty, by kind of accident, year 1953.

KIND OF ACCIDENT	Employees on duty — Killed — Number 1953	Killed — Percent of total 1953	Killed — Percent of total 1952	Injured — Number 1953	Injured — Percent of total 1953	Injured — Percent of total 1952
TRAIN ACCIDENTS						
Collisions	16	5.23	6.25	203	1.05	1.11
Derailments	20	6.54	4.55	201	1.04	.90
Locomotive-boiler accidents	4	1.31	1.99	1	.06	.06
Other locomotive accidents	—	—	—	—	—	—
TRAIN-SERVICE ACCIDENTS						
Coupling or uncoupling:						
Cars or locomotives	7	2.29	2.56	541	2.79	2.55
Air hose	4	1.31	2.27	287	1.48	1.33
Operating locomotives	1	.33	.85	548	2.83	3.50
Operating hand brakes	2	.65	1.70	840	[illegible]	4.05
Operating switches	—	—	—	427	2.20	2.83
Coming in contact with fixed structures	10	3.27	1.99	141	.73	.86
Getting on or off cars or locomotives	14	4.57	4.83	2,685	13.85	14.09
Accidents at highway grade crossings	4	1.31	1.14	31	.16	.20
Struck or run over, not at public crossings	65	21.24	21.59	173	.89	.88
Miscellaneous	71	23.20	26.42	4,579	23.62	24.15
NONTRAIN ACCIDENTS						
Total nontrain	74	24.18	21.02	8,686	44.81	43.16
Total, all accidents	306	100.00	100.00	19,386	100.00	100.00

TABLE NO. 90.—NONTRAIN ACCIDENTS, with resulting casualties, classified according to persons and causes, for the year ended Dec. 31, 1953.

SECTION (a).—STATEMENT OF NONTRAIN CASUALTIES

ITEM	Railways of all classes	
	Killed	Injured
Class of person:		
Employees on duty	74	8,686
Employees not on duty	4	548
Travelers not on trains	3	827
Persons carried under contract	1	36
Other nontrespassers	11	401
Trespassers	32	168
Total	125	10,666

SECTION (b).—DISTRIBUTION OF NONTRAIN CASUALTIES ACCORDING TO CLASS OF ACCIDENT

Class of accident:		
Employees on duty—		
(a) Shop machinery, stationary engines and motors, cranes, etc.	2	176
(b) Locomotive cranes, steam shovels, dredges, pile drivers, etc.	4	86
(c) Transmission apparatus (belts, gears, shafting, ropes, etc.)	—	32
(d) Use of hand tools, apparatus, etc.	1	616
(e) Flying particles	2	252
(f) Explosives and inflammable, hot or corrosive substances	—	174
(g) Electric currents	6	29
(h) Collapse, fall, etc., of objects	10	890
(i) Handling rails, ties, bridge timbers, etc.	1	1,096
(j) Maintenance of way and structures hand cars (nontrain accidents only)	—	65
(k) Maintenance of way and structures motor cars (nontrain accidents only)	12	387
(l) Handling freight or supplies	1	883
(m) Falls of employees not includible in classes (a) to (l)	19	1,811
(n) Miscellaneous nontrain accidents	16	2,189
Total employees on duty in nontrain accidents	74	8,686
(o) Other persons in nontrain accidents	51	1,980
Total nontrain casualties	125	10,666

APPENDIX C

The safety orders of the California Division of Industrial Safety appear in Title 8, Industrial Relations, of the California Administrative Code, including the indices — they cover approximately 1300 pages.

One of these orders, entitled General Industry Safety Orders, covers 288 pages of which 23½ pages are a table of contents and index. This General Order recites that it is adopted to "fulfill the expressed social public policy of the State of California set forth in Article XX Section 21 of the Constitution, to make full provision for securing safety in places of employment" (§ 3200). § 3202 provides:

> "Application of these orders. These orders establish minimum standards and apply to all employments and places of employment in California as defined by Labor Code Sections 6302 and 6303; provided, however, that when the division has adopted or adopts safety orders applying to certain industries, occupations or employments exclusively, in which like conditions and hazards exist, said orders shall take precedence insofar as they are inconsistent with the General Industry Safety Orders hereinafter set forth."

In addition there are the following safety orders:

Air Pressure Tank
Boiler
Compressed Air
(Governing work in Compressed Air)
Construction
Electrical
Elevator
General Industry
Gold Dredges
Lamp Scaffolds and Parallel Safety Orders
Liquefied Petroleum Gases
Logging and Sawmill
Mine
Painting
Petroleum Industry
Petroleum—Refining, Transportation, Handling
Pneumatic Explosives Loading
Quarry
Ship and Boat Building
Trench Construction
Tunnel
Window Cleaning

The scope of the General Industry Safety Orders is indicated by the nine group headings for the various sections which are as follows:

1. General Hazards
2. General Plant Equipment and Special Operations
3. General Mobile Equipment and Auxiliaries
4. Power Transmission Equipment, Prime Movers, Machines, and Machine Parts
5. Points of Operation of Dangerous Machinery
6. Radiation and Radioactivity
7. Cranes and Other Hoisting Equipment
8. Gas Systems for Welding and Cutting
9. Control of Hazardous Substances.

Under General Hazards there are detailed specifications for railings and handrails (§§ 3225-3227), stairways and entrance to stairways and ladders (§§ 3232-3235), headroom and glass (§ 3236), platforms and runways (§ 3237), openings in walls and floors and other openings (§§ 3238-3240), swinging doors (§ 3241), illumination (§ 3242) and trapdoors and exits (§§ 3243, 3244). Article 4 on housekeeping and maintenance (§§ 3250-3258) deals with working areas, drainage and ventilation, aisles and passageways, prime movers, machines and equipment, as to placing and anchoring, hand trucks, storage of materials and scaffolds. Machinery which must be serviced is to be provided with safe platforms or maintenance runways, with proper access to pits and sufficient working space (§ 3262) and safe means of operation shall be provided for valves and controls (§ 3265). Other provisions cover hoses for air or steam (§ 3273), use of compressed air and gases (§ 3274), shields etc. to guard from flying particles (§ 3275) and warning signs (§ 3281). Article 7 has provisions for personal safety covering head, eye, body, hand, foot protection, etc.

It is impossible to cover in detail all of the provisions but the following is a sampling of provisions which could apply in a wheel foundry, the building of cars or work building a retarder yard,—we indicate only the general subjects covered by the regulations:

Air compressors (§ 3351), ladders (§§ 3356-3358), abrasive wheels (§§ 3393-3399), power transmission equipment, prime movers, machines and machine parts (§§ 3500-3551) covering such things as shafting, belts, pulleys and gears. Group 5 deals with points of operation of dangerous machinery and expressly provides for guarding devices. It covers metal working machines of various types, die casting machines, and wood working machines (there is considerable woodwork on freight cars). Under cranes are included locomotive cranes (see p. 432.136) extensively used in building a yard,—Moreno was hurt working with one,—and there are specifications and requirements for ladders, stairs, platforms and cages; warning devices; controllers including brakes and locking devices, fenders, runways, clearances, wheelguards, stops, hoisting ropes and chains, splices, and operating rules as to size of loads, riding on loads etc. The group on welding covers approved markings, training and instruction, ventilation and lighting, water supply and drain connections etc. Group 9, Control of Hazardous Substances covers dusts, fumes, mists, vapors and gases and in considerable detail deals with hazardous substances.

Air pressure tank and boilers are covered by separate orders. There would be air pressure tanks wherever pneumatic tools were used.

The Construction Safety Orders deal with some things dealt with in the General Safety Order such as railings (Art. 12), floor openings (Art. 14), ramps (Art. 15), runways (Art. 16), stairwells and stairs (Art. 17) and scaffolds

(Art. 20). This order also covers excavations (Art. 4), construction towers and elevators (Art. 7-9), derricks (Art. 24), rivet heaters (Art. 23), ladders (Art. 29), welding protection (Art. 35), power shovels and cranes (Art. 46) and trucks and transportation (Art. 47).

The Electrical Safety Orders, among other things, deal with wiring generally, rotating machinery and working space.

The Quarry Safety Rules would apply to railroads in obtaining their own ballast. The order on transportation industries deals particularly with women and minors (p. 819).

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1955

No. 257

SOUTHERN PACIFIC COMPANY,
a Corporation,

Petitioner,

vs.

CHARLES M. GILLIO, EPIMENIO MORENO, ROQUE ARANDA, ALBERT EUFRAZIA and CHARLES ELLIS,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI BY RESPONDENT ALBERT EUFRAZIA.

ARCHIBALD MADISON MULLY, JR.,
[illegible]
Attorney for Respondent
Albert Eufrazia

THOMAS C. PERKINS,
[illegible]
Of Counsel.

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Petitioner,

vs.

CHARLES M. GILEO, EPIMENIO MORENO, ROQUE ARANDA, ALBERT EUFRAZIA and CHARLES ELK,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI BY RESPONDENT ALBERT EUFRAZIA.

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable the Associate Justices of the United States:

Now comes the Respondent, Albert Eufrazia, and in opposition to Appellant's Petition for Certiorari on file herein, respectfully submits:

QUESTIONS PRESENTED FOR REVIEW.

I. Is an advanced carman's helper (Respondent Albert Eufrazia) who is injured on duty through the negligence of his employer (Appellant Southern Pacific Company), a common carrier by railroad, entitled to maintain an action for damages under the Federal Employers Liability Act when his duty at the time of his injury consists of building new railroad cars, some of which are destined to be used in interstate commerce by his employer, and the rest of which are destined to be used by the Texas and New Orleans Railroad Company, which is a subsidiary entirely owned by the employer?

II. If the above question is answered in the negative then a second issue remains:

Is the injured employee (Respondent Albert Eufrazia), nevertheless, entitled to maintain an action for damages under the Federal Employers Liability Act when approximately a month prior to the date of his injury he was employed in the repair of railroad cars which were already in interstate commerce, both the repair work and the new construction work being carried on at the employer's (Appellant Southern Pacific Company) Shop 9, which was under the general supervision of the same supervisor (Mr. Hitke) whose foreman (Mr. Fagan), in charge of the injured employee, simultaneously supervised both repairs and new construction and when the employees, including the injured employee, have the right under a collective bargaining agreement to bid back and forth from one activity to the other on a seniority basis and are

from time to time shifted from one activity to the other?

STATEMENT OF THE CASE.

The Appellant started to work for the Southern Pacific Company in September 1950, at which time he was employed as a carman's helper (R 10*). In March, 1951, he was promoted to an advanced carman's helper (R 16). A carman is defined as one who builds and repairs raflway cars (R 37). While so employed the Respondent was injured on July 10, 1951 (R 9). At all times herein referred to the Respondent was employed in Appellant's Car Shop 9 which was the designation for Appellant's freight car department at its Sacramento shops. Car Shop 9 was one department and was not sub-divided into subdivisions. The Supervisor of Car Shop 9 was Mr. Hitke whose sole duty was to supervise all of the activities carried on in Car Shop 9. The work of Car Shop 9 was confined to all of the work on freight cars as distinguished from passenger cars in the Sacramento Southern Pacific Company shops. Included in this work was the building of new railway cars as well as the repair of railway cars which were already in service in interstate commerce. The foremen under Mr. Hitke supervised both new construction and repairs simultaneously. At the time Respondent was

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*References to transcript refer to Reporter's Transcript before the Supreme Court of California.

injured his foreman, Mr. Fagan, was supervising both repairs and new construction simultaneously (R 155 and 156). Both the building of new cars and the repair of old ones was carried out in the same location. Appellant's Exhibit "L", photograph 4 portrays an assembly line for the construction of new cars and immediately next to the assembly line is a string of old freight cars, including one obviously badly side-swiped, in for repairs. These old cars are standing right next to the assembly line for new cars.

A carman or his helper could bid from new car construction to repair work, or vice versa (R 154). The carmen and their helpers could be and were taken from repair work and placed on new car construction or vice versa, as the need arose (R 142 and 143). When the new assembly line building new cars shut down on several instances, all of the men which had been on the assembly line were ordered to repairs. (R 141).

The Respondent was employed to perform repair work on cars already in interstate commerce prior to June 13, 1951 (R 24). This was slightly over a month before he was injured. At the time that Respondent was injured he was assembling the ends for new gondola cars (R 15). These ends were assembled under a program of building 1000 gondola cars which were assembled at the rate of 18 per day (R 138). After the plaintiff performed his job on the ends they were conveyed by Southern Pacific Company locomotives to a location where they would be applied to the gondola cars (R 87). The Southern

Pacific Company had a contract to assemble these gondola cars for the Southern Pacific Equipment Company, a subsidiary corporation entirely owned by the Southern Pacific Company (R 99). The Southern Pacific Company would charge the Southern Pacific Equipment Company for the cost of the labor used on the gondola cars and in addition would charge six per cent (6%) of the labor costs for the use of its shop facilities and also would charge the Southern Pacific Equipment Company for the cost of materials it supplied. The wheels for the cars were molded in the Southern Pacific Company's shops in Sacramento from old wheels which had come from cars which had been in the service of the Southern Pacific Company (R 138). The Southern Pacific Equipment Company assigned the contract to George Smith and W. J. Wiley as trustees for the Pennsylvania Company for Banking and Trusts, which company would finance the assembling of the gondola cars. On completion of the cars the Pennsylvania Company for Banking and Trusts would lease the cars to the Southern Pacific Company under a lease which provided that the Southern Pacific Company had the immediate use of the cars and that the title to the cars would vest in the Southern Pacific Company when the Southern Pacific Company had repaid the Pennsylvania Company for Banking and Trusts, the amount lent by the latter company (R 119). The Southern Pacific Company subleased some, but not all of the 1000 gondola cars, to the Texas and New Orleans Railway (R 114), which is a subsidiary of, and

entirely owned by the Southern Pacific Company (R 117). The cars not subleased to the Texas and New Orleans Railway would be used in the service of the Southern Pacific Company in interstate commerce (R 121). At all times plaintiff was employed by the Southern Pacific Company. At all times, both while working on repairs and while working on the new gondola ends, plaintiff's time card stated "Freight Car Repairs" (R 68). While assembling the ends, however, the number of the program would also be indicated on the time cards.

ARGUMENT.

I.

THE DECISION BY THE SUPREME COURT OF CALIFORNIA IS CLEARLY CORRECT.

The protection of the Federal Employers Liability Act should not be confined to railroad employees who are aboard moving trains, but should extend to railroad employees on whose activities the running of trains depends. All railroad employees engaged in providing equipment necessary for the movement of trains should be entitled to the protection of the Federal Employers Liability Act whether they are providing new parts, *Trucco v. Erie Railway Company*, 353 Pa. 320, 45 A. 2d 20; *Baird v. New York Central*, 299 N.Y. 2d 13, 86 N.E. 2d 567; or new ties *Erickson v. Southern Pacific Company*, 39 Cal. 2d

374, 246 Pac. 2d 642, certiorari denied 344 U.S. 897, or new cars. The movement of trains in interstate commerce is dependent upon the activities of all of the railroad employees engaged in the above activities. Conversely the railroad in employing men to provide itself with equipment upon which the movement of trains depends is engaged in the activity of a common carrier by railroad. The duties of railroad employees engaged in the above activities in the words of Section 1 of the Federal Employers Liability Act of April 22, 1908, c. 149, Section 1, 35 Stat. 63, as amended by the act of August 11, 1939, c. 685, Section 1, 53 Stat. 1404 (45 U.S.C. Section 1), are in the "Furtherance of interstate or foreign commerce"; and "Directly or closely and substantially affect such commerce".

II.

THE DECISION BELOW TURNS UPON ITS OWN FACTS.

The Respondent was injured while employed as an advanced carman's helper by the Southern Pacific Company in its freight car department at Sacramento, California. This freight car department engaged in both the activities of repairing freight cars which were already in interstate commerce and in building new freight cars which were destined for interstate commerce. This particular freight car department operated as an integrated whole and was not subdivided into subdivisions. One supervisor super-

vised all of the activities of the freight car department and the foreman under him attended to both repairs and new construction. The carmen and their helpers were interchangeable between repairs and new construction. The repair of old cars and the building of new ones was carried out side by side by workmen who were engaged in similar activities. Some were welding on new cars and others were welding on old cars which were in for repairs. Some would be reaming holes in new cars and others would be reaming holes in old cars. The same would apply to painting, riveting and all other skills of the carmen craft. The plaintiff was qualified in all skills of the carmen craft. The decision of the Supreme Court of California is in no way unique or remarkable, but coincides with what any other sound Court would have decided under the particular facts involved.

To hold that a carman is not under the Federal Employers Liability Act because at the time of his injury he happens to be reaming holes in new construction work while his fellow employee, several feet away, doing exactly the same thing on old cars, is under the Federal Employers Liability Act would hopelessly confuse the men employed by the Southern Pacific Company at its Car Shop 9 at Sacramento, California and would lead to results which would be impossible for the attorneys representing these men to explain to them.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Dated, Sacramento, California,
August 12, 1955.

Respectfully submitted,
ARCHIBALD MARISON MULL, JR.,
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Albert Eufrazia.

THOMAS C. PERKINS,
Of Counsel.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 257

SOUTHERN PACIFIC COMPANY, a corporation,
Petitioner,
vs.
CHARLES M. GILEO, EPIMENIO MORENO, ROQUE ARANDA, ALBERT EUFRAZIA and CHARLES EELK,
Respondents.

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA TO REVIEW FIVE CASES INVOLVING IDENTICAL OR CLOSELY RELATED QUESTIONS.

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JUDGE WALSH PRINTING CO., SAN FRANCISCO

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REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA TO REVIEW FIVE CASES INVOLVING IDENTICAL OR CLOSELY RELATED QUESTIONS.

INTRODUCTORY STATEMENT.

This is the reply of plaintiff Charles M. Gileo to defendant's petition for a writ of certiorari out of this Court.

QUESTION PRESENTED.

The petition of the Southern Pacific Company, a corporation, for a writ of certiorari out of this Court is asked upon the alleged grounds that the Supreme Court of California erroneously held that plaintiff was entitled to recover damages for personal injuries under the provisions of the Federal Employers' Liability Act (45 U.S.C.A. Sec. 51) when he was injured while engaged in the construction of new railroad cars that were being made to meet a shortage, which said cars were to be used by the defendant and its subsidiary in interstate commerce.

STATEMENT OF THE CASE AND SUMMARY OF LAW AND FACTS.

The defendant Southern Pacific Company is a common carrier by rail engaged in interstate commerce. The plaintiff is a carman regularly employed by the Southern Pacific Company, and his job rights are controlled by his position on the regular seniority lists. At the time of the accident he was engaged in constructing 5,000 new railroad cars. There was no date set for the completion of this program, it was purely temporary to meet a shortage, and when completed plaintiff would go to whatever job his seniority rights entitled him to.

The Southern Pacific Company was confronted with a shortage of cars to carry on its interstate commerce business and the interstate commerce business of its subsidiary company (Texas & New Orleans Railroad

Company). To meet this shortage, arrangements were made for the manufacture of new cars at Sacramento, California, by order of the Board of Directors of the Southern Pacific Company. These cars were all to be used in interstate commerce, by the defendant or its subsidiary. The plaintiff was injured while engaged in the construction of these new cars.

The Federal Employers' Liability Act provides in part:

> "Every common carrier by railroad while engaging in commerce between any of the several States —shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * *"
>
> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Chapter."
>
> (53 Stats. 1404; 45 U.S.C.A. Sec. 51) as amended 1939.

The plaintiff was clearly entitled to the benefits of the act, for

(a) The defendant was a common carrier by railroad engaged in commerce between the several states.

(b) The plaintiff was employed by the defendant.

(c) The plaintiff's duties were in furtherance of interstate commerce, making cars to be used in interstate commerce to relieve a shortage.

(d) The plaintiff's duties directly, closely and substantially affected such commerce by alleviating a shortage of cars for interstate commerce.

The opinion of the California Supreme Court is in accord with the decisions of the various Courts, Federal and State, that have had occasion to decide the applicability of the second paragraph of the act added by amendment in 1939. This amendment broadened the act and has clarified its application.

The defendant has relied on cases that were decided before the amendment of 1939, and are not in point here; except for *Moser v. Union Pacific R.R. Co.*, 147 Pac. 2d 336, decided by a divided Court, and with which the Supreme Court of California here disagreed. All other cases are in accord with the opinion in this case.

Shelton v. Thomson, 148 F. 2d 1;

Brainard v. A.T. & Santa Fe, 89 F. Supp. 921;

Agostino v. Pennsylvania R. Co., 50 F. Supp. 726;

Ericksen v. Southern Pacific Company, 39 Cal. 2d 374;

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Wills v. Terminal R. Assoc., 205 S.W. 2d 942;

Trucco v. Erie R. Co., 45 A. 2d 20;

Jordan v. Baltimore & Ohio R. Co., 62 S.E. 2d 806.

The decision of the California Supreme Court is in accord with the spirit and intent of the 1939 amendment, which was to broaden the act and to eliminate the technical and finely drawn distinctions that the Southern Pacific Company is again attempting to raise through the language of cases decided before the amendment.

The language of the opinion presents a clear and concise statement of that situation:

> "We cannot agree with the reasoning of the majority opinion in the Moser case. Under the language added by the amendment, an employee of a common carrier by railroad is entitled to the benefits of the act if his duties further interstate commerce or affect it in any way 'directly or closely and substantially,' regardless of whether the work which he is doing may be classified as new construction or repairs. The cars on which plaintiff was working were intended to be used in interstate commerce, and it is clear that the construction of the cars furthered such commerce."

The statute as amended makes no distinction between new construction and repairs; all that is required as the opinion states is that the work "directly or closely and substantially" affect such commerce.

Also, there is no time element in the amendment. If "any part" of the duties of the employee furthers interstate commerce, the employee comes within the act. Under the wording and intent of the amendment of 1939, it is immaterial what mechanical task the employee is engaged in at the time. The test is whether

or not it was in furtherance of interstate commerce; or secondly, whether his duties in any way closely and substantially affected the furtherance of interstate commerce.

The amendment itself is stated disjunctively, that is, it covers an employee if any part of his duties furthers interstate commerce, *or* if any part of his duties in any way directly, or closely and substantially affect such commerce.

CONCLUSION.

The opinion and decision of the California Supreme Court being in conformity with the purpose of the 1939 amendment to the Federal Employers' Liability Act, which broadens and clarifies the applicability of that act, and with the decided cases since the amendment of 1939, it is submitted that petitioner's petition states no ground for the granting of a writ of certiorari by this Court, and that therefore the petition for writ of certiorari by the Southern Pacific Company, a corporation, should be denied.

Dated, Oakland, California,
August 15, 1955.

Respectfully submitted,
CLIFTON HILDEBRAND,
Attorney for Respondents.

D. W. BROBST,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1955.

No. 257

SOUTHERN PACIFIC COMPANY, a Corporation,
Petitioner,

vs.

EPIMENIO MORENO and ROQUE ARANDA,
Respondents.

Respondents' Answer to Petition for Writ of Certiorari to the Supreme Court of the State of California

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Respondents.

Respondents' Answer to Petition for Writ of Certiorari to the Supreme Court of the State of California

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

THE QUESTION PRESENTED

I. **Moreno vs. Southern Pacific Company.**

A. **DOES THE FEDERAL EMPLOYERS' LIABILITY ACT (45 USC 51) APPLY TO A RAILROAD SECTION HAND ENGAGED IN HELPING CONSTRUCT A SUBSTITUTE YARD FOR SWITCHING AND CLASSIFYING RAILROAD CARS ON A MAJOR RAILROAD ARTERY OF INTERSTATE COMMERCE?**

STATEMENT OF FACTS

The Petitioner, Southern Pacific Company, is a Delaware Corporation, doing business as an interstate carrier of passengers and freight for hire by railroad. Near the City of Roseville, Placer County, California, it maintains certain switching yards and tracks used in connection with its said business (Cl. Tr., page 2).

On some date during April, 1951, Petitioner commenced construction at Roseville, California, of what is known as a retarder yard. The purpose of this retarder yard was to better facilitate the movement of its interstate freight trains. (Rep. Tr. 2, page 6). Prior to the construction of the retarder yard switching was done by switch engines. The retarder yard enabled Petitioner to change to "gravity" switching, with a resulting economy in operations. The retarder yard was an improvement over the previously existing method of switching (Rep. Tr. 1, page 7).

A main line of the Southern Pacific Company runs from Sacramento, California to Reno, Nevada, and points eastward. The old main line which existed adjacent to the place the retarder yard now stands was removed and a new main line constructed in connection with the retarder yard project (Rep. Tr. 1, page 8). To construct the new retarder yard new tracks for freight trains had to be laid. To construct these new tracks some of the ties from the old main line were used (Rep. Tr. 1, pages 46, 47), (Rep. Tr. 2, page 84).

On October 3, 1951, the Respondent employed Petitioner as one of its workmen to help do the common labor connected with the construction of the retarder yard (Rep. Tr. 1, page 44). Between October 3, 1951, and December 19, 1954, Respondent worked continuously at such labor in the retarder yard and spent about fifteen days on the

main line "tramping" ties (Rep. Tr. 1, page 49). On three prior occasions he had worked as a section hand for Petitioner maintaining and repairing existing interstate rail lines (Rep. Tr. 1, page 43).

On December 19, 1951, while employed by Petitioner as aforesaid at Roseville, California, Respondent was called upon to guide a 1400 pound rail being lifted by a crane so that it could be placed into position on a new track bed (Rep. Tr. 2, page 86). There were three men working as a team in this operation. One operated the crane and one was on each end of the rail (Rep. Tr. 2, page 9). The track was being built at a point which required the men to work in mud and water. The men wore eight-inch boots (Rep. Tr. 2, page 32).

While a rail was being lifted into position by the crane, and while it was being guided by Respondent and a fellow employee, for some reason it became unbalanced, and the end opposite Respondent went forward at a faster rate. The crane operator noticed this, and without any signal or other warning to Respondent, lowered the rail to the ground suddenly, where it landed upon Respondent's foot, injuring it. At about the moment the rail was being lowered, Respondent's foot slipped on a piece of metallic material (Rep. Tr. 2, page 93). In the ordinary course of their operations the crane operator would wait for a signal from Respondent before lowering the rail. On this occasion the rail was lowered without any such signal. The signal had not been given because the rail was still about eighteen inches from the rail bed where it was supposed to be placed (Rep. Tr. 2, pages 93-94).

Respondent suffered a crushing type foot injury resulting in fracture of the second and third metatarsals. The fracture extended into the metatarsal-cuneiform joint.

Motion in the joint is accompanied by pain. The joint will never be a good joint again (Rep. Tr. 2, pages 14, 15, 16).

ARGUMENT

I. The Federal Employers' Liability Act (45 USC 51) Applies to a Railroad Section Hand Engaged in Helping Construct a Substitute Yard for Switching and Classifying Railroad Cars on a Major Railroad Artery of Interstate Commerce.

A. THE ACT IN QUESTION.

The pertinent section of the Act involved in this case reads as follows:

> "Any employee of a carrier, any part of whose duties as such employee shall be in the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this act." 53 Stat. 1404, 1939.

Thus, an employee may invoke the Act if any part of his duties (1) furthers interstate commerce or, (2) directly or closely and substantially affects such commerce.

B. PURPOSES OF THE ACT.

Prior to 1939, the Federal Employers' Liability Act covered only those employees of a carrier who, at the "moment of injury" were engaged in interstate commerce or work so closely related thereto that it was practically a part thereof. 10 ALR 1184 and cases cited. This led to much confusion as to when an employee was and when he was not in interstate commerce. In order to eliminate such confusion Congress, in 1939, amended the Act to eliminate the "moment of injury test." Congress intended to extend the coverage of the act to borderline railroad occupations. 10 ALR 2d 1282.

1283; *Edwards v. Baltimore & Ohio R. Co.*, 134 F. 2d 366; *McLeod v. Threlkeld*, 319 U.S. 491; *Southern Pacific Co. v. Ind. Acc. Com.*, 19 Cal. 2d 271.

The Act is now almost all-inclusive. *Taylor v. Lumaghi Coal Co.*, 352 Mo. 1212, 181 S.W. 2d 536; *Wright v. N. Y. Cent. R. Co.*, 263 App. Div. 461, 33 N.Y. Supp. 531, Cert. denied 317 U.S. 668. In order to effectuate the purposes of the Act the Courts should give it a liberal interpretation in favor of its application to any given case. *Ermin v. Penn. R. Co.*, 36 F. Supp. 936; *Lewis v. Ind. Acc. Com.*, 19 Cal. 2d 284.

C. THE ACT AS APPLIED TO THE FACTS OF THE CASE AT BAR.

(1) Did the duties of Respondent as a section hand, cause him to further interstate commerce?

The affirmative answer to the above inquiry dictated by the facts of this case may not be logically evaded. The testimony of Mr. William F. Turner, Construction Division Engineer of the Petitioner is as follows on this point:

Mr. Colley: "Do you have knowledge as to the purpose of the project?"

Mr. Turner: "Well, the purpose is to speed up the classification of cars and certain economies to be effected."

Mr. Colley: "In other words, the purpose of the project, then, stated another way is to better facilitate the movements of the Southern Pacific Company's trains?"

Mr. Turner: "Freight trains, yes."

Mr. Colley: "Freight trains?"

Mr. Turner: "Freight trains."

Mr. Colley: "These freight trains whose movements this project is intended to facilitate come from over all lines?"

Mr. Turner: "Yes, they come from all over."

Mr. Colley: "When I refer to all over lines, I have reference to out of State, for instance."

Mr. Turner: "Yes, they come from the east."

Mr. Colley: "When you say 'east' just where do you have in mind?"

Mr. Turner: "Well, they come from anywhere in the east, Ogden, Chicago, New York."

Mr. Colley: "You mean Ogden, Utah, Chicago, Illinois, and New York, New York?"

Mr. Turner: "Yes, and many other places."

. . . . . .

Mr. Colley: "So this project then, was an improvement in the switching operations over an existing method of switching, is that right?"

Mr. Turner: "Well, it was — of course, this was a brand new project, and it facilitated switching." (Rep. Tr. 1, pages 6 and 7).

Thus, it is clear that any company employee, including Respondent who helped construct the project was engaged in an activity which furthered interstate commerce since the purpose of the project was to facilitate switching operations of freight trains operating in interstate commerce.

(2) Was Respondent, as a section hand, engaged in an activity which closely, directly or substantially affects interstate commerce?

Again, the answer must be in the affirmative. Respondent and his fellow employees tore up the old main line in the area of the new retarder yard and laid a new one. The very day of his injury Respondent was engaged in helping lay a track which used cross ties from the old main line as well as some new ones. In essence, he was repairing the tracks. The cases quite uniformly hold that repair activities are covered by the Act. *Shelton v. Thomson*, 148 F 2d 1; *Zimmermann v. Scandrett*, 57 F Supp. 799; *Mills v. Terminal R. Ass'n.*, 205 S.W. 2d 942; *Harris v. Mo. Pac. R. Co.*, 149 Pac. 2d 342; *Marie v. Gulf M. & O. R. Co.*, 219, S.W.

322; *Lewis v. Ind. Acc. Com.*, 19 Cal. 2d 284; 10 ALR 2d 1273.

(3) Assuming, for purposes of argument only, that Respondent was working on an entirely new project, the applicability of the Act in this case would remain. The true test of its applicability is affect upon or furtherance of interstate commerce, and is unrelated to whether the particular employment involves new or old construction. *Agostino v. Penn. R. Co.*, 50 F. Supp. 726; *Mo. Pac. R. Co. v. Fisher*, 177 S.W. 2d 725; *St. Louis-S. F. Ry. v. Wacaster*, 199 S.W. 2d 948; *Wright v. N. Y. Cent. Ry. Co.*, 33 N.Y. Supp. 2d 531. In the *Wacaster* case and the *Agostino* case the employee was held to be within the coverage of the Act, even though in each he was engaged in new construction. The case of *Moser v. Union Pac. R. Co.*, 65 Idaho 479, 147 Pac. 2d 336, reaches a contrary result, but it is submitted that the theory of the *Moser* case is that the Act should be strictly applied, and is therefore in direct conflict with the authorities cited above. See also *Erickson v. Southern Pac. Co.*, 39 Cal. 2d 374.

II. It Was Reversible Error for the Trial Court to Render Judgment Notwithstanding the Verdict Since There Was Substantial Evidence to Support the Verdict of the Jury.

On a motion of judgment notwithstanding the verdict, the trial Court must disregard all conflicts in the evidence, and draw every reasonable inference therefrom which favors support of the verdict of the jury. Few rules are more well settled in our law.

Hunt v. United Bank & Trust Co. (1930), 210 Cal. 108;

Card v. Boone (1930), 210 Cal. 200;

Ferran v. Southern Pacific Co. (1935), 3 Cal. 2d 350;

Finkler Estate, 3 Cal. 2d 584 (1935);
Neel v. Mannings, Inc. (1942), 19 Cal. 2d 647;
Been v. Lammus Co. (1946), 76 Cal. App. 2d 288;
Docherty v. Key System (1947), 80 Cal. App. 2d 888;
Devens v. Goldberg (1948), 33 Cal. 2d 173;
Champion v. Bennetts (1951), 37 Cal. 2d 815;
Tice v. Kaiser Co. (1951), 102 Cal. App. 2d 44.

Respondent alleged in his complaint, and offered evidence tending to prove that Petitioner was negligent in two particulars. It was charged that the crane was negligently operated, and also that Respondent was not provided with a safe place to work.

A. NEGLIGENT OPERATION OF CRANE.

The best evidence of the negligent operation of the crane came from the crane operator, Mr. Coe, a witness for Petitioner. We quote:

Mr. Colley: "Mr. Coe, you said when you saw Moreno, the rail was on his foot, is that right?"

Mr. Coe: "That's right."

Mr. Colley: "You didn't see him slip?"

Mr. Coe: "I didn't see him slip until the rail was on his foot." (Rep. Tr. 2, pages 143, 144).

* * * * * * *

Mr. Colley: "And did you see Moreno at all times while he had the rail?"

Mr. Coe: "I did." (Rep. Tr. 2, pages 147-148).

It appears from the above that the crane operator could not have lowered the rail onto the foot of Respondent except through negligence. His failure to exercise ordinary care in the operation of the crane was negligence. *Spear v. Leuenberger*, 44 Cal. App. 2d 236.

It must also be remembered that the rail was lowered to the ground without warning before it was in the usual position from which it should have been lowered. From this alone the jury could reasonably draw an inference of negligence on the part of Petitioner, acting through the agency of the crane operator.

THE QUESTION PRESENTED

I. Aranda vs. Southern Pacific Company.

A. DOES THE FEDERAL EMPLOYERS' LIABILITY ACT (45 USC 51) APPLY TO AN EMPLOYEE OF AN INTERSTATE COMMON CARRIER BY RAIL INJURED WHILE RE-MOULDING TRAIN WHEELS WHICH HAVE BEEN WORN OUT IN USE ON INTERSTATE TRAINS?

STATEMENT OF FACTS

The Petitioner, Southern Pacific Company, is a railroad corporation organized and existing under and by virtue of the laws of the State of Delaware, and authorized to do and engaged in doing business as a common carrier of passengers and freight for hire in the State of California and other states.

At Sacramento, California, Respondent owns and maintains various tracks, switching yards, store houses, and repair facilities for trains operated in interstate commerce, an iron foundry, a brass foundry, a wheel foundry, and passenger and freight stations.

Since the year 1939, Respondent, Roque Aranda, has been employed by Petitioner as a wheel moulder in its wheel foundry in Sacramento, California (Rep. Trans. of 12-11-51, proceedings pp. 54, 55). As such moulder, he assisted in the remoulding of cast iron wheels. These remoulded wheels are remoulded from old wheels removed from freight cars operating in interstate commerce (Rep. Trans. of 12-11-51, proceedings pp. 52, 53). The old wheels which provide the

metal for the wheel foundry at Sacramento may come from anywhere on Petitioner's lines, which lines extend from Sacramento, California, north to Portland, Oregon, northeast to Ogden, Utah, southeast to El Paso, Texas, south to the Mexican border, and west to San Francisco, California (Rep. Trans. of 12-11-51, proceedings p. 10). Thus, for example, when a wheel becomes unserviceable in Portland, Oregon, Ogden, Utah, or El Paso, Texas, it is shipped by one of Petitioner's interstate trains to the Sacramento foundry for "repair", the "repair" process being one of remoulding the wheel (Rep. Trans. of 12-11-51, proceedings pp. 12, 13).

The old wheels removed from freight cars (because they are no longer serviceable) are delivered to the foundry by means of flat cars upon which they have been loaded. The flat cars come to the Sacramento wheel foundry from various sources both within and from outside the State of California. When the wheels have been remoulded at Sacramento, California, some of them are sent on flat cars directly to Ogden, Utah, and Portland, Oregon, where axles are affixed to the wheels (Rep. Trans. of 12-11-51, proceedings p. 63). Others are hauled by means of a straddle truck to the stores department of Petitioner to be stored for use as the need arises (Rep. Trans. 12-11-51, proceedings, p. 64). Petitioner maintains a spur track directly connecting its foundry with its main track leading to Portland, Oregon, and other similar centers (Rep. Trans. of 12-11-51, proceedings pp. 24, 25, 62).

Upon completion of the assembly of the axle unit in Portland or Ogden the wheel and axle are returned by the interstate railroad of Petitioner to its Sacramento, California repair shop. Here it is fitted upon trains as needed, some going on entirely new cars being assembled in Sacra-

mento by Petitioner, and others being placed upon old cars as repairs (Rep. Trans. of 12-11-51, proceedings pp. 24, 25, 26, 27). The repaired cars go wherever the need arises, be it Roseville, California, or El Paso, Texas, and/or points in between.

The Petitioner and the industry in general knows of no feasible way of repairing used or worn cast iron wheels except to remould them. Thus, Petitioner conducts its remoulding process at its Sacramento, California, wheel foundry (Rep. Trans. of 12-11-51, proceedings p. 50), where approximately 84% of all wheels used on its freight trains are remoulded from old wheels (Rep. Trans. of 12-11-51, proceedings pp. 16, 17).

On the 12th day of June, 1950, Respondent was severely burned by molten metal while preparing to pour it into a mould at Petitioner's Sacramento wheel foundry (R. 69, 15, 54). At the time of his injury, the ladle containing hot melted iron had been hooked onto a cable (R. 18, 19), and lifted up and suspended above a mould in the inner circle of moulds (R. 38). When the ladle was approximately six or seven inches above the mould, the cable slipped from its anchored end on the boom and caused the ladle to hit the mould and overturn on its side resulting in the spilling of its content of molten material (R. 89, 90).

After the molten metal was spilled on the ground as a result of the slippage of the cable from its anchored position, Respondent sought to escape from the molten material (R. 37, 45), but found an obstruction at the nearest normal exit in the form of a platform left there by another employee of Petitioner (R. 106, 107, 108, 109, 110). He turned right and sought to jump over the ring of moulds, and in doing so landed in the spilled molten metal and suffered the above referred to burns (R. 37).

ARGUMENT

The Federal Employers' Liability Act (45 USC 51) Applies to an Employee of an Interstate Common Carrier by Rail Injured While Re-Moulding Train Wheels Which Have Been Worn Out in Use on Interstate Trains.

The pertinent section of the Act as amended in 1939, applicable in this case reads as follows:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act." 53 Stat. 1404, 1939.

Thus, it appears that an employee may invoke the act if any part of his duties (1) further interstate or foreign commerce (2) or directly or closely and substantially affect such commerce.

Prior to the 1939 Amendment, the Federal Employer's Liability Act covered only those employees of a carrier who, at the moment of their injury, were engaged in interstate commerce or work so closely related thereto as to be practically a part of such commerce. See 10 ALR 1184 and cases cited. This led to much confusion as to when an employee was and when he was not in interstate commerce. Thus, Congress amended the Act in 1939 to end the confusion resulting from the efforts of courts to apply the strict "moment of injury" test to every case. 10 ALR 2d 1282-1283; *Edwards v. Baltimore & Ohio R. Co.*, 131 F.2d 366; *McLeod v. Threlkeld*, 219 U.S. 491, 87 L.ed 1538, 63 S.Ct. 1248; *Southern Pac. Co. v. Ind. Acc. Com.*, 19 Cal. 2d 271.

The Act as amended in 1939 is now almost all inclusive, and fine distinctions are no longer necessary. Prior to the amendment, many cases turned upon some slight differentiation in duty or operation, more apparent, than real, with much hair splitting and little certainty. Thus, it was to avoid all this and to give a fixity of application that Congress amended this Act to include any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce. See *Wright v. New York Cent. R. Co.*, 263 App. Div. 461, 33 NYS 2d 531, cert. den. 317 U.S. 668. See also *Taylor v. Lumaghi Coal Co.*, 353 Mo. 1212, 181 S.W. 2d 536, for similar direct furtherance of interstate work concept.

In the principal case the Respondent's duties as a moulder of wheels caused him to further interstate commerce. Practically every one of Petitioner's interstate freight trains run on wheels made in its Sacramento wheel foundry (Rep. Trans. of 12-11-51, proceedings pp. 16, 17). Thus, not only is interstate commerce furthered by the duties of Petitioner, it is made possible by such duties. As one learned Court profoundly observed, no train may run without wheels, even in interstate commerce. *Shelton v. Thomson*, 148 Fed. 2d 1. In the *Shelton* case, the Plaintiff was employed to operate a crane used in lifting train wheels in a repair shop. The Act was held to apply to him.

Surely, without the operations performed by Respondent and others in Petitioner's foundry at Sacramento, its repair shop activities at Portland, Oregon, and other places would be paralyzed.

Petitioner attempts to make a distinction between "manufacturing" and "commerce". In arriving at a decision in the case at bar the Court need not draw any such line between that which is manufacturing and that which is commerce.

The applicable law makes the Petitioner liable if (1) any part of Respondent's duties further interstate commerce, or (2) any part of his duties substantially or closely affect such commerce. Thus, if we assume, for purposes of argument only, that Respondent was on the date of the accident engaged in manufacturing or production, the Petitioner is liable just the same.

The Courts make no apparent effort to distinguish between manufacturing and commerce. Thus, a blacksmith's helper engaged in making new strap hangers to be used by Defendant interstate railroad as replacement parts for its trains has been held to be covered by the Act. *Trucco v. Erie R. Co.*, 45 A.2d 20, Cert. denied 328 U.S. 843. Also, an employee running a forging machine for manufacturing small new parts for trains withdrawn from interstate commerce also has been held to be protected by the Act. *Baird v. N. Y. Cent. R. Co.*, 86 N.E. 2d 567.

Petitioner seeks also to suggest that the Act has no application to "new" construction but from the foregoing paragraph it may be seen that if an employee making new strap hangers as replacement parts for interstate trains, and one who makes new parts on a forging machine are protected by the Act, there is no method of reasoning by which Petitioner may successfully exclude Respondent. Could it be that new strap hangers for trains further interstate commerce or more substantially affect such commerce than train wheels? Most trains could probably run in interstate commerce without strap hangers, but few, if any, could run without wheels. Moreover, the true test of the applicability of the Act is its effect upon or furtherance of interstate commerce, and is unrelated to whether the particular employment involves new or old construction. *Agostino v. Penn. R. Co.*, 50 F. Supp. 726; *Mo. Pac. R. Co. v. Fisher*,

177 S.W. 2d 725; *St. Louis-S. F. Ry. v. Wacaster*, 199 S.W. 2d 948; *Wright v. N. Y. Cent. Ry. Co.*, 33 N. Y. Supp. 2d 531. In the *Wacaster* case and the *Agostino* case the employee was held to be within the coverage of the Act, even though in each he was engaged in new construction. The case of *Moser v. Union Pac. R. Co.*, 65 Idaho 479, 147 Pac. 2d 336, reaches a contrary result, but it is submitted that the theory of the *Moser* case is that the Act should be strictly applied, and is therefore in direct conflict with the authorities cited above. For a case indicating a liberal interpretation of the Act, see *Erickson v. Southern Pac. Co.*, 39 Cal. 2d 374.

It should be borne in mind that all of Petitioner's activities are handled under one parental roof and it is not a corporation solely engaged in the remoulding of car wheels. Here the whole chain of activity started with the taking off of the old car wheels, which were worn out, the transferring of those old car wheels into a furnace where they are melted down, the pouring of this new melted material into remoulding units, the creation of the remoulded car wheel, the affixing of the axles and the subsequent attaching of those axles and car wheels to freight cars operating in interstate commerce. Surely, this is to be treated as one single operation for all practical purposes and all under the general control of Petitioner in a manner obviously directly and substantially affecting interstate commerce.

Further, assuming without admitting the necessity for showing Petitioner's activity at the wheel foundry to be one of "repair" rather than "manufacturing" to bring this case at bar within the terms of the Act, it seems to be self-evident that no wheel can be "manufactured" until some car needs "repair". The foregoing statement is extremely

pertinent here in view of the fact that no molten material can exist without the prior existence of the worn out wheels. Without the first worn out wheel there can be no creation of the new molten material. The mere fact that many of the wheels are stockpiled for a period does not break the chain of causality between the creation of the remoulded wheels and their running on interstate railroad tracks, since it is the need for "repairs" which furnishes the material for the start of the so-called "manufacturg". The entire procedure of remoulding looks forward to and is created for the purpose of repairing the freight cars which become unserviceable due to the need for repair of its wheels.

The duty of Respondent is nothing more than to repair one of Petitioner's instrumentalities of interstate commerce, temporarily withdrawn from such commerce, so that it may be returned to the commerce from which it has been temporarily withdrawn. The only way to repair a worn cast iron freight train wheel is to melt it down and remould it. Petitioner's foundry is essentially a repair shop, and the cases quite uniformly hold that repair shop activities are covered by the Federal Employer's Liability Act. *Shelton v. Thomson*, 148 Fed. 2d 1; *Zimmermann v. Scandrett*, 57 F. Supp. 799; *Mills v. Terminal R. Assn.*, 205 S.W. 2d 942; *Harris v. Mo. Pac. R. Co.*, 149 P. 2d 342; *Maxie v. Gulf M. & O. R. Co.*, 219 S.W. 322; 10 ALR 2d 1273; *Lewis v. Ind. Acc. Com.*, 19 Cal. 2d 284.

CONCLUSION

It is submitted that in both the *Moreno* case and the *Aranda* case what we have is really repair and maintenance activity. In one instance worn out train wheels were being repaired. In the other an existing method of switching and classifying railroad cars was being improved. Certiorari should be denied.

Respectfully submitted,

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1955

No. 257

SOUTHERN PACIFIC COMPANY,
a corporation,
Petitioner,

vs.

CHARLES M. GILEO,
Respondent.

REPLY BRIEF ON WRIT OF CERTIORARI.

CLIFTON HILDEBRAND,
Attorney for Respondent

D. W. BROBST,

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INTRODUCTORY STATEMENT.

This is the reply of respondent Charles M. Gileo to the brief filed by the petitioner Southern Pacific Company. The questions and issues raised in this case are in general the same as those presented by the actions involving the other named respondents.

STATEMENT OF THE CASE AND SUMMARY OF FACTS.

The petitioner Southern Pacific Company is a common carrier by rail engaged in interstate commerce.

The respondent, Charles M. Gileo was a carman regularly employed by the Southern Pacific Company. At the time of the accident in question, his job rights were controlled by his position on the regular Southern Pacific Company seniority lists. (R. 28.) At the time of his injury, the respondent was engaged in the petitioner's program of constructing new railroad cars. There was no date set for the completion of this program; it was purely temporary to meet a shortage of cars to be used in interstate commerce by the Southern Pacific Company and its subsidiary, Texas & New Orleans Railroad Company.

The Southern Pacific Company was confronted with a shortage of cars to carry on its interstate commerce business and the interstate commerce business of its subsidiary company, Texas & New Orleans Railroad Company. To meet this shortage, the Board of Directors of the Southern Pacific Company arranged for the manufacture of the cars at Sacramento, California. These cars were to be used in interstate commerce by the petitioner and its subsidiary. The cars were for the furtherance of the business of petitioner and its subsidiary only. (Def. Ex. A.R. 140.)

A method of financing the construction work was set up by the Southern Pacific Company through its subsidiary the Southern Pacific Equipment Company, and the Pennsylvania Company for Banking and Trusts. (Def. Ex. G, H.R. 149, 150, 151.)

All the work was done by the regular employees of the Southern Pacific Company who were given their

jobs in accordance with the regular seniority lists of that company. (R. 28, 29.)

The respondent Charles M. Gileo was a journeyman carman, and a qualified welder in the regular employ of the petitioner, working in the general shops of petitioner at Sacramento, California. (R. 94, 110.) In February of 1951 respondent Gileo bid for and got a job as a welder in Car Shop No. 9 to work on the construction of new railroad cars. (R. 95.) On July 11, 1951 he was injured while engaged in constructing new gondola cars. (R. 97.) The shop where the work was being done was known as Car Shop No. 9 and was divided into two parts, one doing repair work and the other constructing new cars. The shop consisted of ten parallel tracks, e.g.

10. .....
9. .....
8. .....
7. .....
6. .....
5. .....
4. .....
3. .....
2. .....
1. .....

The new construction work was done on tracks 10 and 9, and running repairs on cars in interstate service were done on tracks 1 and 2. Heavy and general repair work was done on the six in-between tracks. The distance between tracks was twelve feet. (R. 32, 33.)

These carmen, all on the same seniority list and in the same union, were *working side by side on these tracks* and their duties were interchangeable, and they could bid on the jobs of their selection on the various tracks according to their seniority.

Shop No. 9 was under control of one general foreman, with an assistant foreman for new construction and one for heavy repairs on old equipment. (R. 26.)

The men working in this car shop were assigned back and forth from the new work to repair work and there was a ten percent absenteeism from the new car construction that was taken care of by men doing repair work on old equipment. (R. 36, 37, 38.) The respondent was at all times subject to call in repair work or to transfer to such work on a shutdown on Track 9. The Southern Pacific Company retained control of the respondent in his work and assignments, subject to his rights on the seniority list of that company. (R. 29.) While on new construction that was respondent's regular job until completion of the program, or until through the seniority list he could move to a better one or unless there was a shutdown.

QUESTION PRESENTED.

This appeal presents the following broad question:

Was the Supreme Court of the State of California is error in holding that a regular employee of a common carrier by rail was entitled to recover damages for injury under the provisions of the Federal Em-

ployers' Liability Act as amended in 1939, (45 U.S. C.A. 51), where such a regular employee was, to meet a temporary shortage, engaged in constructing new cars to be used in interstate commerce by that company and its subsidiary only?

ARGUMENT.

(a). THE DUTIES OF RESPONDENT WERE COVERED BY THE 1939 AMENDMENT TO THE FEDERAL EMPLOYERS' LIABILITY ACT (45 U.S.C.A. 51).

The petitioner is a common carrier engaged in interstate commerce. The respondent was a regular employee of that common carrier, the petitioner Southern Pacific Company. The petitioner admits that it was faced with a shortage of railroad cars to carry on its business of a common carrier by rail. (Def. Ex. A.R. 140.) So, to further its business as a common carrier and to keep this commerce in operation, (Def. Ex. A.R. 140), it used its regular employees to construct additional equipment, to-wit, new cars. It did not enter into a new business. Its business at all times was that of a common carrier by rail. The act as amended states:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce.

> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404."
>
> 45 U.S.C.A. Sec. 51.

The respondent Gileo was constructing new cars for the petitioner, not for sale, or as a business, but so that the petitioner Southern Pacific Company could continue unimpeded in its interstate commerce operation. And the test under the statute as amended is:

> "Are these duties (duties of the respondent) and their due execution a natural step in an interstate operation; would this elimination affect or impede commerce."
>
> *Overstreet v. North Shore Corporation,* 318 U.S. 125, 63 S.Ct. 494 (1943).

Certainly this test is squarely met by the occupation of respondent, for had the function of petitioner been eliminated or performed improperly there would not have been adequate equipment to carry on fully the interstate business of the petitioner, and in consequence, the interstate commerce operations of the petitioner would have been impeded and affected.

And, where, as here, under the Federal Employers' Liability Act as amended, an employee is engaged in

work, "any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially affect such commerce," (45 U.S.C.A. 51) the Supreme Court of California, clearly and correctly, held respondent to have been performing duties that affected interstate commerce "directly or closely and substantially", and that the construction of the new cars clearly "furthered such commerce." (R. 229, 232.)

It seems idle argument to say, as petitioner does, that because it attempted to acquire sufficient equipment adequately to further its business as a common carrier by using its own employees to manufacture new cars to supply that deficiency that it stepped into the category of a manufacturer and out of the business of a common carrier. The sole and only purpose of making the new cars was to further and aid the business in which petitioner was engaged, a common carrier by rail. This purpose was succinctly expressed by the resolution of the Board of Governors in the following language, ". . . additional freight cars are urgently needed to handle commercial carloadings and increasing Government military shipments." (Def. Ex. A, R. 140.) Petitioner in its brief points to no other purpose or intent. This manufacture of new cars was but an incident to the uninterrupted business of the petitioner as a common carrier by rail.

The employees engaged in this new construction, when absent, were replaced by employees engaged in general repairs. (R. 37, 38.) When this workman

was doing work on the new construction would he be outside the coverage of the Federal Employers' Liability Act? Certainly under the Act as it now reads his remedy for injury would be under that Act. Prior to 1939 he would have fallen under the confusing "moment of injury" interpretation of the Act and his compensation would have been under the state statute. It was this confusion resulting from such *working side by side* on tracks but twelve feet apart that the Act as amended was intended to remedy, making the test simply whether or not the work being done was in furtherance of interstate commerce, or did it in *any way* directly or closely and substantially affect such commerce.

As stated by this Court in *Mitchell v. Vollmer & Co.*, 349 U.S. 427, 99 L.Ed. 1196, the test must be a practical one.

> "We do not think that case should control this one. We are dealing with a different Act of another vintage—one that has been given a liberal construction from A. B. Kirschbaum Co. v. Walling, 316 US 517, 86 L. ed 1638, 62 S. Ct. 1116, to Alstate Constr. Co. v. Durkin, 345 US 13, 97 L.ed 745, 73 S.Ct. 565. The question whether an employee is engaged 'in commerce' within the meaning of the present Act is determined by practical considerations, not by technical conceptions. See Walling v. Jacksonville Paper Co., 317 US 564, 570, 87 L.ed 460, 467, 63 S.Ct. 332; Overstreet v. North Shore Corp., 318 US 125, 128, 130, 87 L.ed 656, 660, 661, 63 S.Ct. 494. The test is whether the work is so directly and vitally related to the functioning of an instrumentality or facil-

ity of interstate commerce as to be, in practical effect, a part of it rather than isolated, local activity. See McLeod v. Threlkeld, 319 US 491, 497, 87 L.ed. 1538, 1543, 63 S.Ct. 1248. Repair of facilities of interstate commerce is activity 'in commerce' within the meaning of the Act, as we held in J. F. Fitzgerald Constr. Co. v. Pedersen, 324 US 720, 89 L.ed 1316, 65 S.Ct. 892. And we think the work of improving existing facilities of interstate commerce, involved in the present case, falls in the same category."

It was the intent of those framing the amendment to eliminate this confusion of "time" tests, and questions of new or old construction and to broaden the Act to cover employees such as respondent.

"It broadens and clarifies the law in its application to employees who may be killed or injured while in the service of a railroad company engaged in interstate or foreign commerce."

(See Senate Judiciary Committee Report, Appendix Petitioner's Brief, p. 3.)

"The adoption of the proposed amendment will, to a very large extent, eliminate the necessity of determining whether an employee, at the very instant of his injury or death, was actually engaged in the movement of interstate traffic. If any part of the employee's duties (at the time of his injury or death) directly, closely, or substantially, affected interstate or foreign commerce, the claimant would be considered entitled to the benefits of the act."

(See Senate Judiciary Committee Report, Appendix, Petitioner's Brief, p. 4.)

Here, in spite of the amendment, and in spite of the avowed purpose of the amendment as expressed by the Judiciary Committee, the opposition would have *these men working on these ten parallel tracks with duties and seniority interchangeable* subject to the old "moment of injury" test. This situation differs none at all from the expressed example given by the Judiciary Committee that it was intolerable and unreasonable to class switchmen working on parallel tracks as either being in interstate or intrastate work depending on the class of commerce being handled by each individual at the "moment of injury". Under the old rule, one man at one moment would be in local commerce while his fellow worker on the same union seniority list on the adjacent track might be in interstate commerce. It was to eliminate this distinction among others which caused the committee to point this situation out as a prime example of the purpose of the amendment.

The respondent was an employee of a common carrier by rail. The Southern Pacific Company was never in any other business. To attempt to compare employees of the Pullman Company or Railway Express with employees of the Southern Pacific Company is fallacious because those companies are not common carriers by rail, and their employees never could have been and never have been covered by the Federal Employers' Liability Act.

It seems clear that under the present wording of the Federal Employers' Liability Act as amended (45 U.S.C.A. 51) if the duties of the employee "shall be

in the furtherance of interstate or foreign commerce; or shall *in any way* directly or closely and substantially affect such commerce", then he is covered by the Act. So long as the employee's duties fall under either of the foregoing categories there is liability under the Federal Employers' Liability Act. Consequently, the old tests of "moment of injury" and whether the employee in his work wore a white shirt or a work shirt or whether the work was new or old, have been eliminated. This maze of uncertainty created by the above antiquated tests of "time", "clothing" and new or old work has been cleared and removed by the amendment of 1939. The petitioner seeks here again to create fine distinctions, technical barriers and uncertainty, by a theoretical and critical analysis of cases prior to the amendment of 1939 in an attempt to show that they are still controlling.

It is submitted that the Supreme Court of the State of California correctly held that these old cases are no longer to be considered and that respondent was entitled to the benefits of the Federal Employers' Liability Act as broadened and clarified by the amendment of 1939.

(b) GENERAL COMMENT ON PETITIONER'S ARGUMENT AND LAW.

(1) The Law.

The petitioner has cited numerous cases that arose prior to the amendment of the Federal Employers' Liability Act in 1939. We will not attempt to enumerate them here as they are too numerous. However, on

this point we wish to say that the very purpose of the committee proposing the amendment was to eliminate this mass of confused litigation by broadening and clarifying the act. The gist of petitioner's argument is that the old tests of "moment of injury" and "work shirt" as opposed to "white shirt" and new as opposed to old work should still be applied under the new law. These old cases and this reasoning, as stated above, passed with the amendment, which is a new law, with a new and practical outlook.

Mitchell v. Vollmer & Co. (supra).

The new law now covers the employee of a common carrier by rail "if any part of 'his duties', as such employee, shall be the furtherance of interstate or foreign commerce; or shall in any way directly or closely and substantially affect such commerce."

Cases decided prior to this law are no longer controlling and will not be discussed.

The principal case relied upon by the petitioner is *Mosher v. Union Pac. R. R. Co.*, 147 Pac. 2d 336, decided since the amendment. The Supreme Court of the State of California would not approve of that decision, and it is also in conflict with the following cases:

Shelton v. Thomson, 148 F. 2d 1;
Brainard v. A. T. & Santa Fe, 89 F. Supp. 921;
Agostino v. Pennsylvania R. Co., 50 F. Supp. 726;
Ericksen v. Southern Pacific Company, 39 Cal. 2d 374;

Southern Pacific Co. v. Industrial Accid. Com., 19 Cal. 2d 283;

Wills v. Terminal R. Assoc., 205 S.W. 2d 942;

Trucco v. Erie R. Co., 45 A. 2d 20;

Jordan v. Baltimore & Ohio R. Co., 62 S.E. 2d 806;

Robinson v. Pennsylvania R. Co., 214 F. 2d 798.

It is also in conflict with *Mitchell v. Vollmer & Co.* (supra).

Petitioner has cited several cases involving the Jones Act (36 U.S.C.A. 688). Those cases are not in point as they turn on the question of "situs." If the vessel is on navigable waters the act applies. If not, the act does not apply. There is no common ground of analogy between the two classes of cases as applied to the facts of the actions involved here.

(2) Argument of Petitioner.

Petitioner argues that, at the time of the injury to respondent, it was not engaging in interstate commerce as a common carrier by rail, but was making new cars. Petitioner further argues that being engaged in manufacturing new cars, the injured employee was not covered by the act as the first paragraph requires the employer to be engaging in interstate commerce (or transportation) by rail, at the time of injury. This is merely an attempt upon the part of petitioner to reverse the old argument of "moment of injury" and apply it to the employer. This type of argument is basicly false. The sole and only business of the Southern Pacific Company at the time

of the injury to respondent was that of a common carrier by rail engaging in interstate commerce. The only purpose for the manufacture of the new cars was to further that business and keep it going unimpeded by shortages of cars. (Def. Ex. A, R. 140.)

There could be situations where the act would not apply. If, for example, a railroad company developed oil wells and hired employees to operate the wells, then clearly if the oil was not used in the operation of the railroad, but was sold on the open market, the railroad would not in that instance be engaging in interstate commerce by rail, nor would the employee. That is not the situation here. What the employer was having done and what the employee was doing were activities done for the furtherance of interstate commerce, for a company engaging in interstate commerce by rail.

It is beside the point to argue, as petitioner does, that fine distinctions and technical barriers preventing the employees of railroad from recovery for injury under the Federal Employers' Liability Act are not harmful for the reason that the employee still has access to compensation under state laws. The very reason that the employees seek recovery under the Federal Employers' Liability Act with the burden of establishing liability upon the part of the railroads is because of the grossly inadequate compensation paid under State Compensation Laws. Take for example, the engineer who earns some $600.00 a month, if injured and off work, the only compensation he will re-

ceive from the State of California is the maximum $120.00 a month. This is a question for the legislature and not for the courts.

SUMMATION.

Prior to the amendment of 1939, the Federal Employers' Liability Act provided that every interstate rail carrier "shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce."

A great deal of confusion was created among railroad workers, under this language, as to whether or not they were engaged in interstate or intrastate commerce at the "moment of injury". (See cases collected in 10 A.L.R. 2d 1279). And a great many workers were deprived of the benefits of that act by this confusion, or were required to try two cases to have their rights determined.

Because of this confusion the 1939 amendment was added:

> "An employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."
>
> (45 U.S.C.A. 51.)

As stated by the Judiciary Committee of the Senate, the first objective of the amendment was:

> "It broadens and clarifies the law in its application to employees who may be injured or killed while in the service of a railroad company engaged in interstate or foreign commerce."

(From report by the Committee on Judiciary, see Appendix A, Petitioner's Brief, p. 3.)

The amendment broadened the act in two ways. First, the so-called "moment of injury" test and other artificial tests such as whether the work was "new construction" or old were eliminated by the phrase "any part of whose duties". This new phrase sets up a definite test and clearly makes the general nature of the employee's duties the controlling factor. If "any part" of those duties furthers interstate commerce, the employee is certainly covered. This, even though at the "moment of injury" the particular mechanical task he was performing may have been purely intrastate. Second, the amendment extended coverage to one not immediately engaged in furthering interstate commerce if his duties in any way "closely and substantially" affected the furtherance of interstate commerce. The amendment is stated disjunctively, that is, it covers an employee if any part of his duties further interstate commerce, or if any part of his duties in any way directly, or closely and substantially affect such commerce.

Certainly here the respondent, who was making railroad cars so his employer, as a common carrier by

rail, would not have to slow down or stop its operation in interstate commerce because of a shortage of such cars, was performing duties both as to furthering interstate commerce and closely and substantially affecting such commerce.

CONCLUSION.

It is submitted that the Supreme Court of the State of California was correct in holding that the duties of the respondent were such at the time of his injury, that he was entitled to the benefits of the Federal Employers' Liability Act under its present broadened and clarified scope, and that, therefore, the judgment of that Court should be affirmed.

Dated, Oakland, California,
April 9, 1956.

CLIFTON HILDEBRAND,
Attorney for Respondent.

D. W. BROBST,
Of Counsel.

In the Supreme Court of the United States

October Term 1955

No. 257

SOUTHERN PACIFIC COMPANY, a Corporation,

Petitioner,

v.

CHARLES M. GILEO, EPIMENIO MORENO, ROQUE ARANDA, ALBERT EUFRAZIA and CHARLES EELK,

Respondents.

Brief For Respondent, Albert Eufrazia

On Writ of Certiorari to the Supreme Court of the State of California

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SOUTHERN PACIFIC COMPANY, a Corporation,

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CHARLES M. GILEO, EPIMENIO MORENO, ROQUE ARANDA, ALBERT EUFRAZIA and CHARLES EELK,

Respondents.

Brief For Respondent, Albert Eufrazia

On Writ of Certiorari to the Supreme Court of the State of California

QUESTION PRESENTED FOR REVIEW

Does the Federal Employers' Liability Act apply to an upgraded carman's helper who was employed by a common carrier by railroad, engaged in interstate commerce, in the freight car department of its general shops where old freight cars were repaired and new freight cars were assembled when the employee performed repairs until June 13, 1951, and assembled new cars from June 13, 1951 until he was injured on July 10, 1951?

STATEMENT OF THE CASE

The Respondent, ALBERT EUFRAZIA, started to work for the Petitioner, SOUTHERN PACIFIC COMPANY, in September, 1950, at which time he was a carman's helper in Petitioner's car shop No. 9 at Sacramento, California. In March, 1951, he was promoted to an upgraded carman's helper. An upgraded carman's helper is a man who has been qualified by the management and the Brotherhood of Railway Carmen of America to perform all of the tasks required of a carman. (R 426, R 460) These tasks included the assembling of new cars, the rebuilding of old cars and the repair of old cars. (R 460, R 433) Prior to June 13, 1951, Respondent had performed repairs on old cars. (R 424) On June 13, 1951, Respondent was given the task of reaming holes in ends which were to be installed on gondola cars. (R 423, R 458) These gondola cars were being assembled at car shop No. 9. Respondent remained at this task until he was injured on July 10, 1951.

From the time that he was first employed until the time that he was injured Respondent was continuously employed at car shop No. 9. Car shop No. 9 was the designation for the freight car department of Petitioner's general shops in Sacramento, California. This department of the shops did all of the work pertaining to freight cars and this was its exclusive function. (R 501) This work consisted of assembling new freight cars, rebuilding old cars and repairing freight cars. Mr. Harry Hitke was in charge of car shop No. 9 and everyone in car shop No. 9 was responsible to Mr. Hitke. Mr. Hitke had the authority to transfer the men in car shop No. 9 from the task of assembling new cars to the task of repairing old cars, and vice versa, as he saw fit, (R 502, R 511), and from time to time did so. (R 511, R 512) The Respondent's foreman, Mr. Fagan, was directly under Mr. Hitke and simultaneously had charge of men who were repairing old cars and of men who were

assembling new cars. (R. 523) Car Shop No. 9 was one integrated unit and was not subdivided into two separate entities.

ARGUMENT

I

Respondent's Duties Furthered Interstate Commerce.

The Respondent was an upgraded carman's helper. By definition an upgraded carman's helper means a railroad worker who is qualified, eligible and required to perform tasks pertaining to the repair, maintenance and upkeep of railroad cars, as well as tasks pertaining to the assembling of railroad cars. Respondent's duties while employed by the Petitioner as an upgraded carman's helper from time to time required him to repair railroad cars. The courts have uniformly held that repair work is under the FELA as amended in 1939. *Maxie* v. *Gulf M & O Railway Company*, 358 Mo. 1100, Certiorari denied 338 U.S. 823; *Southern Pacific Company* v *Industrial Accident Commission*, 88 C.A. 2d, 569; *Southern Pacific Company* v *Industrial Accident Commission*, 19 Cal 2d 271; *Southern Pacific Company* v. *Industrial Accident Commission*, 19 Cal 2d 283.

As long as some of the tasks which are included in a railroad worker's duties further interstate commerce he is under the FELA regardless of how remote from interstate commerce the task he is performing at the time he is injured happens to be. *Wright* v. *New York Central*, 33 N.Y. S. 2d, 531, affirmed 43 N.E. 2d, 97, Certiorari denied 317 U.S. 668; *Zimerman* v. *Scandrett*, 57 Fed Supp 799; 10 A. L.R. 2d 128.

The Respondent is a railroad man. In the summertime when workers in other industries are on Daylight Saving

Time, Respondent remains on Pacific Standard Time, which he refers to as "railroad time". His very language is in the vernacular of a railroad man. His social security benefits are administered under the Railroad Unemployment Insurance Act[1] and the Railroad Retirement Act[2], the former of which is geared to FELA by its subrogation practices. When Respondent or his family are ill or injured they are treated in a railroad hospital by railroad doctors. He belongs to a railroad brotherhood which has a contract with the railroad. His labor relations are governed by the Railway Labor Act[3]. His seniority roster is composed of railroad men. His associates are all railroad men. His bosses are all railroad men. He and his fellow workers are constantly working around railroad tracks and railroad equipment, the operation of which is governed by railroad practices and rules. He is exposed to the same hazards and he has the same problems as any other railroad man, and this sets him apart from workers in other industries.

The Respondent's duty is to provide Petitioner with freight cars for its trains and to keep them rolling. This is as integral a part of interstate transportation as the part played by the men who operate the trains. Without Respondent Petitioner's freight trains would not roll for long.

(1) 53 Stat. 1113 (1939) as amended; 45 USC a. 351-367.

(2) 49 Stat. 967 (1935); 50 Stat. 307 (1937); 60 Stat. 722 (1946); 63 Stat. 576 (1948); 45 USC a. 228.

(3) Railway Labor Act of May 20, 1926, c. 347, a. 1, 44 Stat. 577; as amended (1934), 48 Stat. 926; (1934) 48 Stat. 1185; (1936) 49 Stat. 1921; (1940) 54 Stat. 785-786; (1948) 62 Stat. 991; (1949) 63 Stat. 107; 45 USC a. 151-188.

II

CAR SHOP No. 9 IS AN INTEGRATED UNIT ENGAGED IN INTERSTATE COMMERCE.

Respondent at all times worked in car shop No. 9. Car shop No. 9 was the freight car department of the Petitioner's general shops in Sacramento, California. Car shop No. 9 physically was all in one contiguous area of space. Car shop No. 9 engaged in repairing freight cars, in rebuilding old freight cars and in assembling new freight cars. All of this work was done in the same area. Men were assembling new cars on tracks which were adjacent to tracks on which repairs were being made.

Both assembling new cars and repairing old cars involved tasks which are alike. These tasks both require work involving air brakes, trucks, underframes, sides, ends, safety appliances, roofs, draw bars, etc. Many of the same tools and pieces of equipment are used for both assembling new cars and repairing old cars. The men who were engaged in assembling new cars had the same skills and were exposed to the same hazards as those who were repairing old cars. They were used in either task as the need arose. The supervision required for assembling new cars and for repairing old cars both had to have the same technical knowledge. In fact, Mr. Eagan, the foreman immediately over the Respondent at the time he was injured, simultaneously supervised work on the assembling of new cars and on the repair of old cars. (R 523) Mr. Hitke was the supervisor of car shop No. 9 and could shift the men from task to task as the need arose, and the men, subject to their seniority roster, could shift from task to task, which according to the reasoning of *Terminal Railroad Association of St. Louis* v *Fitzjohn*, 165 F 2d 473, makes FELA applicable.

Car shop No. 9 operated as an integrated unit and was an intimate part of interstate transportation. The function

of car shop No. 9 was to provide Petitioner's trains with freight cars, and to maintain them in condition. Without car shop No. 9 Petitioner's freight trains would not roll for long.

III

ASSEMBLING FREIGHT CARS FURTHERS INTERSTATE COMMERCE.

The FELA should apply even in Respondent's sole duty was to assemble new cars. At the moment of his injury Respondent was assisting in assembling gondola cars from new parts. These cars when assembled were to be used by the Petitioner to supplement its existing rolling stock. In order to carry on its business as a common carrier by railroad. Petitioner was assembling these gondola cars, The assembling of these cars was as necessary a part of interstate transportation as keeping them in repair after they were assembled.

Soundly reasoned cases hold that there is no magic in the phrase "New consruction" which should preclude a railroad worker from asserting the remedy which Congress intended him to have. These cases hold that FELA applies to railroad workers who are assisting in providing the railroad with new equipment which it requires for interstate transportation. *Erickson v. Southern Pacific Company*, 39 Cal 2d 374, Certiorari denied 344 U.S. 897; *Trucco* v *Erie Railway Co.*, 353 Pa 320; *Baird v. N. Y. Central*, 299 N. Y. 2d 13; *Agostino* v. *Pennsylvania Railway*, 50 Fed Supp 726.

IV

UNIFORMITY REQUIRES THAT FELA APPLY.

The assembling of new cars required the same type of men and supervision and many of the same type of tools and equipment as was required for the rebuilding of old cars and for the repair of old cars. The men engaged in the assembling of new cars were of the same classification (carmen and their helpers) and had the same skills and abilities as the men engaged in the rebuilding of old cars and in the repair of old cars. The hazards involved in the assembling of new cars were as great and of the same type as the hazards involved in rebuilding old cars and in repairing old cars.

The same management supervised the assembling of new cars and the rebuilding of old cars and the repair of old cars. Actually the same personnel assembled new cars, rebuilt old cars and repaired old cars.

To avoid the perplexing problem of distinguishing between what is the assembling of a new car and what is the repair of an old car, it is necessary to hold that all of these men are under the Federal Act, otherwise the following problems could arise: Suppose that a wreck has caused a draw bar to be torn out of a car and that the car is shopped, and that the only thing necessary to be done to the car is to add a new draw bar. Is that new construction or repairs? Suppose that not only a new draw bar is added but that new sides and ends are also added. Is that new construction or repairs? Suppose that a wreck has caused everything to be knocked from a car except the underframe and the trucks and the car is rebuilt using the old underframe and trucks. Is that new construction or repairs? Suppose that a wreck knocks everything from a car except the trucks and the car is reconstructed from the trucks up. Is that new construction or repairs? Suppose that only the

wheels are left and a car is reconstructed from the wheels up. Is that new construction or repairs? The same supervisors and personnel would perform the above tasks as would perform the work at issue in the case now before the court and their hazards would be the same as those to which Respondent was subjected.

The only way to avoid confusion is to hold that all of these carmen and their helpers have the same remedy irrespective of whether they happen to be assembling new cars, rebuilding old cars or repairing old cars at the time they are injured.

V

RAILROAD EMPLOYEES ENGAGED IN THE SAME ACTIVITY SHOULD BE UNIFORMLY TREATED THROUGHOUT THE UNITED STATES.

The work of a railroad worker engaged in interstate commerce affects the United States as a whole and is a national problem. Railroad companies spread over many states and litigation concerning them can best be handled through a Federal remedy rather than a remedy confined to one state.

The problems of Respondent's relations with his management and his social security are all regulated by Federal legislation which is solely applicable to railroad workers. The problem of his being injured on the job is also a problem which concerns the United States as a whole. This problem should be handled by the Federal Government and not be left to the caprice of the legislatures of the various states which are designed to deal with local problems.

The philosophies of the various states as to the value of life and limb varies according to their respective economies, populations and backgrounds. The legislation of the various

states as to workmen's compensation varies not only as to the amount of award recoverable by the injured workman, or in death cases by his surviving dependents, but also as to defenses available to the employers, coverages, exemptions and medical benefits.

Compensation rates for workmen temporarily disabled from working range from maximum benefits of $40.00 weekly (based on a percentage of average weekly earnings) in the states of Minnesota[4] and California[5], to maximum benefits of $25.00 weekly in the states of Arkansas[6] and Mississippi[7]. Death benefits for surviving dependents vary from a maximum recovery of $17,500.00 in Minnesota[8], to a maximum recovery of $6,000.00 in Wyoming[9].

Medical coverage for the injured workman ranges from full benefits for either accident or industrial disease[10] to a limit of 90 days treatment and a maximum of $1,000.00 medical expenses in Alabama.

Non-resident alien dependents are completely excluded from any benefits by reason of the death of a wage earner by the statutes of the five states of Alabama, New Mexico, Pennsylvania, South Dakota and West Virginia. Most of the other states provide for reduced benefits for non-resi-

(4) Minnesota statutes 1953, Ch. 176, Sec. 176.101 as amended by L. 1955, Ch. 615.

(5) California Labor Code, Sec. 4460.

(6) Initiated Act No. 4, adopted by the electorate in November, 1948, amending in its entirety Act No. 319, Acts of 1939, as amended and effective December 3, 1948, Sect. 10.

(7) H. B. 351, approved April 13, 1948, effective January 1, 1949, Sect. 6 as amended by L. 1950, H. B. 433, effective April 6, 1950.

(8) Minnesota statutes 1953, Ch. 176, Sec. 176.111, Sub. 20.

(9) Wyoming Laws 1951, Ch. 143, Sect. 42, 43.

(10) By statute ten states provide for full medical coverage: California, Connecticut, Massachusetts, Minnesota, Mississippi, Nebraska, New York, North Dakota, Washington and Wisconsin.

dent alien dependents, and only the five states of Connecticut, Minnesota, Ohio, Tennessee and Texas place nonresident alien dependents on the same footing as resident dependents.

The defenses available to an employer to defeat a workman's claim vary from intoxication and intent to injure self, permitted by statute in a majority of states[11], to willful failure to use safety devices, which is a complete defense in thirteen states[12] and a penalty factor reducing the award recoverable in eight states[13].

Other defenses provided by some workman's compensation statutes are injury inflicted by third person for personal reasons[14], violation of law or failure to perform statutory duty[15], and willful disobedience of safety regulations[16].

By the statutes of six states employees of common carriers or railroads are excluded from the coverage of the workman's compensation acts[17]. In each of these states the

(11) The defense of intoxication is not present in the statutes of Arizona, Illinois, Massachusetts, Michigan, Missouri, Montana, Oregon, Pennsylvania, Texas, Washington and Wyoming. Intent to injure self is not statutorily a defense in Connecticut, Illinois, Michigan, Missouri, Montana, Nebraska, New Hampshire, Texas and Wyoming.

(12) Alabama, Delaware, Florida, Georgia, Indiana, Kansas, Louisiana, Oklahoma, South Dakota, Tennessee, Vermont, Virginia and Washington.

(13) Colorado, Kentucky, Montana, New Mexico, North Carolina, South Carolina, Utah and West Virginia.

(14) Alabama, Delaware, Georgia, Iowa, Minnesota or Pennsylvania.

(15) Alabama, Delaware, Indiana, New Hampshire, Pennsylvania, South Dakota, Tennessee.

(16) Alabama, Florida, Georgie, Indiana, Louisiana, Virginia, and West Virginia.

(17) Florida, North Carolina, South Carolina, Texas, Virginia, Washington.

remedy of an injured railroad employee is to file an action based on negligence against his employer. The problem as recognized in these states is succinctly stated in the statute of Washington which provides,

> "Inasmuch as it has proved impossible in the case of employees of common carriers by railroad, engaged in maintenance and operation of railways doing interstate . . . . and intrastate commerce, and in maintenance and construction of their equipment, to separate and distinguish the connection of such employees with interstate . . . . commerce from their connection with intrastate commerce, ... the provisions of this title shall not apply to work performed by such employees . . . ."[18]

There is nothing to prevent any of the states from eliminating or making their compensation acts less liberal in the future, both as to the amount of the award, and as to the allowance of various defenses, or in determining which conditions are not industrial injuries. The railroad worker has no guarantee that the various states won't so act due to a reversal of the modern trend of thought or to local politics.

([18]) Rev. Code of Washington, Title 51, Section 51.12.080.

VI

FELA AFFORDS BETTER REMEDY FOR RAILROAD WORKERS THAN WORKMAN'S COMPENSATION ACTS.

The Petitioner's brief leads one to the belief that it wishes the Respondent's claim to be determined under the Industrial Accident Commission because of some humanitarian concern for the railroad worker. The real reason that it prefers the Industrial Accident Commission to the FELA is that awards are much higher under the FELA than under even the relatively liberal workman's compensation act of the state of California. Not only is the allowance for disability considerably less under workman's compensation, but no allowance can be made in a compensation award for physical or mental pain and suffering which does not interfere with earning capacity. *Shaw* v. *Salt River Valley Water Users Association*, 69 Ariz. 309, 213 P 2d 378; *Linderman* v. *State Industrial Accident Commission*, 183 Ore. 245, 192 P 2d 732. Disfigurement is compensable by statute in only twenty-seven states[19], and generally to a limited extent only insofar as it interferes with the ability to secure or retain employment. Impotency is a non-disabling injury which is not compensable under workman's compensation statutes. *Hyett* v. *Northwestern Hospital*, 147 Minn. 418, 180 N.W. 552; *Farnum* v. *Garner Paint Works and Bleachery*, 229 N.Y. 554; *Morris* v. *Muldoon*, 229 N.Y. 611, 129 N.E. 928; *Smith* v. *Baker*, 157 Okla. 155, 11 P 2d 132.

The situation of an injured railroad worker not having a compensable claim under the FELA is very rare. Accidents don't just happen, they are caused, and in almost every

(19) Alabama, Arkansas, Colorado, Florida, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Minnesota, Missouri, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Vermont, Wisconsin, and Wyoming.

instance a contributing cause has been the negligence of the railroad company in its failure to provide reasonably safe equipment, or a reasonably safe place to work, or by the fault of a fellow employee, or by the failure of the railroad company to supply an adequate number of men, or by the carelessness of the railroad in supervising and managing the work.

Neither the administration of the Industrial Accident Commission nor of our Court system is free to the taxpayers. However, economy should not be the primary concern where justice is involved. To the credit of our law and of our legal system, justice works better in our courts of law, which are founded upon democratic processes, than it does in any administrative agency. Our law courts not only have the benefit of the common sense and good judgment of juries, but also have the traditional judicial safe guards.

The law works best when both sides of the controversy have professional attorneys striving for their respective causes. Lawyers have expenses in maintaining their offices and in living. In order for the legal profession to exist it must have fees to meet these expenses. The FELA through contingent fee agreements offers an incentive to lawyers to take cases on behalf of injured railroad employees who otherwise often would not be able to pay a lawyer for his time in preparing and trying his case. The fee offered by the Industrial Accident Commission is even lower than the compensation received by the injured worker. The only law firms that can make a reasonable living out of an Industrial Accident Commission practice are those which defend insurance companies on a mass production basis.

The FELA not only affords a practical method for a poor man to retain the services of an attorney, but it also solves the problem of financing law suits. Personal injury law suits, as well as workman's compensation cases, often in-

volve scientific problems of medicine and engineering. A railroad can afford to retain scientific experts to assist in the preparation of their case and to testify on their behalf. The contingent fee arrangement, permissible under the FELA, enables the plaintiff's attorney to advance the cost of retaining an expert to present the plaintiff's side of the case. The Industrial Accident Commission offers no solution to this problem to the injured man, who is often obliged to listen to the defendant's expert without the benefit of presenting an expert on his own behalf.

No remedy for a wronged person has as yet been devised as effective as recourse to our courts of law and under our system there is nothing more salutary in encouraging railroads to use due care as fear of a first class law suit.

CONCLUSION

The FELA is a suitable remedy with which Respondent is perfectly happy and there is no sound reason for excluding Respondent's case from the FELA where it logically belongs.

DATED: Sacramento, California

April 12, 1956.

ARCHIBALD MARISON MULL, JR.
Attorney for Respondent
Alfred Eufrazia

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Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 257

SOUTHERN PACIFIC COMPANY,
a Corporation,
Petitioner,

vs.

EPIMENIO MORENO and ROQUE ARANDA,
Respondents.

Respondents' Brief

On Writ of Certiorari to the Supreme Court of the State of California

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The Moreno Case

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. .....

SOUTHERN PACIFIC COMPANY, a Corporation, *Petitioner,*

vs.

EPIMENIO MORENO and ROQUE ARANDA, *Respondents.*

Respondents' Brief

On Writ of Certiorari to the Supreme Court of the State of California

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

I. THE MORENO CASE

THE QUESTION PRESENTED

A. Does the Federal Employers' Liability Act (45 U.S.C. 51) Apply to a Railroad Section Hand Engaged in Helping Construct a Substitute Yard for Switching and Classifying Trains on a Major Railroad Artery of Interstate Commerce?

STATEMENT OF FACTS

In April, 1951, Petitioner, a common carrier of freight and passengers by rail in interstate commerce commenced

construction at Roseville, California, of what is known as a retarder yard (Tr. 255). A main interstate rail line of Petitioner runs from Oakland, California, through Roseville, California, and on to points as far east as Ogden, Utah, with connections to Chicago and New York (Tr. 256). The purpose of the retarder yard was to effect a change over to gravity switching of freight cars from the previously existing method of switching by use of switch engines (Tr. 255). The new method was an improvement over the existing method of switching, and effected an economy in operations (Tr. 256). In order to construct the retarder yard, the existing artery of interstate commerce used by Petitioner had to be re-routed (Tr. 257). The new tracks in the retarder yard were constructed in part from old cross-ties from the old main line (Tr. 284-85). Removal of the old main line was commenced about October 1, 1951 (Tr. 257). The relocation of the main line and the construction of the retarder yard constituted one integrated project (Tr. 257). The alteration of the main line was completed in November, 1951, but it had been in use on a restricted basis prior to its completion (Tr. 258).

The term "retarder yard" is applied to the entire project, including the receiving yard, classification yard, and the departure yard (Tr. 263-279). The receiving yard was completed by August, 1951, and during that month was put into operation as a switching yard (Tr. 278).

On October 2, 1951, Respondent, Epimenio Moreno, approached a timekeeper of Petitioner at Rocklin, California, seeking employment. The timekeeper gave Respondent a paper and sent him to Sacramento, where after presentation of it to the proper official, he was employed as a laborer and sent forthwith to Roseville, California, for work on the retarder yard (Tr. 283-84). Among the first tasks of Re-

spondent was that of helping remove cross-ties from the old main line (Tr. 284). Some of these he and his fellow workers would burn, and others they used in the construction of the new yard (Tr. 285-86).

While working on the retarder yard Respondent lived in "outfit" cars belonging to Petitioner. These cars were stationed on a company side-track near Rocklin, California (Tr. 289).

On December 19, 1951, Respondent received an injury to his foot when Respondent's crane operator allowed a rail to drop upon it (Tr. 288). As a result of his injuries, Respondent brought an action under the Federal Employer's Liability Act (45 U.S.C. 51). The issue of the applicability of the Act was heard before the trial court without a jury. The decision of that court was that the case was properly brought, and thereafter upon a trial on the merits before a jury a verdict for plaintiff-respondent in the sum of $5,000.00 was returned (Tr. 248). The trial court granted judgment for the railroad n.o.v. upon the ground that no negligence on its part was shown (Tr. 249).

Upon appeal to the Supreme Court of California, the judgment n.o.v. was reversed, and the verdict for plaintiff-respondent ordered reinstated (Tr. 299).

ARGUMENT

I. The Federal Employers' Liability Act (45 USC 51) Applies to a Railroad Section Hand Engaged in Helping Construct a Substitute Yard for Switching and Classifying Railroad Cars on a Major Railroad Artery of Interstate Commerce.

A. THE ACT IN QUESTION.

The pertinent section of the Act involved in this case reads as follows:

> "Any employee of a carrier, any part of whose duties as such employee shall be in the furtherance of inter-

> state or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this act." 53 Stat. 1404, 1939.

Thus, an employee may invoke the Act if any part of his duties (1) furthers interstate commerce or, (2) directly or closely and substantially affects such commerce.

B. PURPOSES OF THE ACT.

Prior to 1939, the Federal Employers' Liability Act covered only those employees of a carrier who, at the "moment of injury" were engaged in interstate commerce or work so closely related thereto that it was practically a part thereof. 10 ALR 1184 and cases cited. This led to much confusion as to when an employee was and when he was not in interstate commerce. In order to eliminate such confusion Congress, in 1939, amended the Act to eliminate the "moment of injury test." Congress intended to extend the coverage of the act to borderline railroad occupations. 10 ALR 2d 1282-1283; *Edwards v. Baltimore & Ohio R. Co.*, 131 F 2d 366; *McLeod v. Threlkeld*, 319 U.S. 491; *Southern Pacific Co. v. Ind. Acc. Com.*, 19 Cal. 2d 271.

The Act is now almost all-inclusive. *Taylor v. Limaghi Coal Co.*, 352 Mo. 1212, 181 S.W. 2d 536; *Wright v. N. Y. Cent. R. Co.*, 263 App. Div. 461, 33 N.Y. Supp. 531, Cert. denied 317 U.S. 668. In order to effectuate the purposes of the Act the Courts should give it a liberal interpretation in favor of its application to any given case. *Ermin v. Penn. R. Co.*, 36 F Supp. 936; *Lewis v. Ind. Acc. Com.*, 19 Cal. 2d 284.

The report of the Senate Judiciary Committee dealing with the purpose of the 1939 Amendment had this to say:

> "The Adoption of the proposed amendment will, to a very large extent, eliminate the necessity of determining whether an employee, at the very instant of his injury or death, was actually engaged in the movement of interstate traffic. If any part of the employee's duties (at the time of his injury or death) directly, closely, or substantially affected interstate or foreign commerce, the claimant would be considered entitled to the benefits of the act." (Senate Rep. No. 661, June 22, 1939.)

It is significant that the employee's duties at the time of his injury is stated to be the controlling test. Congress evidently assumed that if the activity of the employee "directly, closely, or substantially" affected interstate commerce, his employer would likewise be engaged in such activity. This seems reasonable since the act of the employee in the course and scope of his employment is of necessity the act of his employer. This is the essence of the master-servant relationship.

Petitioner assumes that in order for an employee to be protected by the Act, his employer, at the time of the injury, must be engaged in "interstate transportation or work so closely connected with it as to be a part of it" (Petitioner's Brief Page 107). They do not tell us how close the activity must be to transportation before it is close enough to be a part of it. In fact, they give us no clear distinction between "transportation" and "commerce." We see no reason to strike from the Act the words "interstate commerce" as used by Congress, and substitute therefore more restrictive words such as "interstate transportation."

We shall make no effort to answer the bulk of the historical argument made by Petitioner. While we believe that all

of the cases now before the court are covered by the Federal Employers' Liability Act as amended, we do not believe our two cases, *Moreno* and *Aranda*, involve new construction or any other activity not traditionally covered by that Act. It is true that the Supreme Court of California stated in its opinion in the *Moreno* case that the construction was new, but the transcript of the trial showing the nature of the work is before this court for review. The transcript should govern.

C. THE FACTS APPLIED TO THE CASES AT BAR.

(1) The Moreno Case.

Moreno was a section hand, an occupation as typically railroading as being a conductor on a limited express or a switchman on a freight. Maintenance and improvement of an existing highway of interstate commerce was an activity covered by the Act even prior to the 1939 Amendment. *Pedersen v. Delaware Etc. R. Co.*, 229 U.S. 146. In the *Pedersen* case this court said:

> "* * * the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and legal effect a part of it."

We believe that the record clearly shows that Moreno was repairing, maintaining and improving an existing instrumentality of interstate commerce. The retarder yard upon which he was working was an integrated project consisting of a receiving yard, a classification yard, and a departure yard (Tr. 263-279). In connection with the construction of these yards the existing main line of the railroad had to be relocated (Tr. 257). It is significant that the relocation of the main line, a project upon which Respondent worked, was completed in November, 1951, and Respondent was not injured until December 19, 1951. Thus, when he was injured,

this part of the project was in full use as a highway of interstate commerce.

The receiving yard was completed and put into use as a switching yard in August, 1951, prior to the employment of Respondent.

There can be no doubt that if Moreno had been injured on December 19, 1951; on the new main line which was then in use as a highway of interstate commerce he would have been covered by the Act. Likewise, if he had been injured on that date while employed in the part of the retarder yard known as the receiving yard he would have been covered, since this part of the retarder yard had been in use for switching interstate trains since August, 1951. Could it be that Moreno's rights are to be made to depend upon in which part of the retarder yard he received his injury?

The retarder yard represented nothing more than an effort of Petitioner to improve an existing method of performing an interstate function. The testimony of Mr. William F. Turner, Construction Division Engineer of the railroad is as follows on this point:

> "Mr. Colley: Do you have knowledge as to the purpose of the project?
>
> Mr. Turner: Well, the purpose is to speed up the classification of cars and certain economies to be effected.
>
> Mr. Colley: In other words, the purpose of the project, then, stated another way is to better facilitate the movements of the Southern Pacific Company's trains?
>
> Mr. Turner: Freight trains, yes.
>
> Mr. Colley: Freight trains?
>
> Mr. Turner: Freight trains.
>
> Mr. Colley: These freight trains whose movements this project is intended to facilitate come from over all lines?
>
> Mr. Turner: Yes, they come from all over.

Mr. Colley: When I refer to all over lines, I have reference to out of State, for instance.

Mr. Turner: Yes, they come from the east.

Mr. Colley: When you say 'east' just where do you have in mind?

Mr. Turner: Well, they come from anywhere in the east, Ogden, Chicago, New York.

Mr. Colley: You mean Ogden, Utah, Chicago, Illinois, and New York, New York?

Mr. Turner: Yes, and many other places."

Thus, it is clear that any company employee, including Respondent, who helped construct the project was engaged in an activity which furthered interstate commerce since the purpose of the project was to facilitate switching operations of freight trains operating in interstate commerce.

(2) Was Respondent, as a section hand, engaged in an activity which closely, directly or substantially affects interstate commerce?

Respondent and his fellow employees tore up the old main line in the area of the new retarder yard and laid a new one. The very day of his injury Respondent was engaged in helping lay a track which used cross-ties from the old main line as well as some new ones. In essence, he was repairing the tracks. The cases quite uniformly hold that repair activities are covered by the Act. *Shelton v. Thomson*, 148 F2d 1; *Zimmerman v. Scandrett*, 57 F. Supp. 799; *Mills v. Terminal R. Assn.*, 205 S.W. 2d 942; *Harris v. Mo. Pac. R. Co.*, 149 Pac. 2d 342; *Marie v. Gulf M. & O. R. Co.*, 219 S.W. 322; *Lewis v. I.A.C.*, 19 Cal. 2d 284.

It is also significant that Moreno and the other members of his section gang were provided with living quarters by the railroad in outfit cars along its regular rail line.

We submit that even in the unlikely event that this court should decide that "new construction" is not covered by the

Act, the judgment in the Moreno case should be affirmed. This is not to say that we believe the so-called "new construction" test has any validity. We simply do not feel that Moreno was engaged in wholly new construction.

I. ARANDA V. SOUTHERN PACIFIC COMPANY

THE QUESTION PRESENTED

A. Does the Federal Employers' Liability Act (45 U.S.C. 51) Apply to an Employee of an Interstate Common Carrier by Rail Injured While Remolding Train Wheels Which Have Been Worn Out in Use on Interstate Trains?

STATEMENT OF FACTS

The Petitioner, Southern Pacific Company, is a railroad corporation organized and existing under and by virtue of the laws of the State of Delaware, and authorized to do and engaged in doing business as a common carrier of passengers and freight for hire in the State of California and other states.

At Sacramento, California, Respondent owns and maintains various tracks, switching yards, store houses, and repair facilities for trains operated in interstate commerce, an iron foundry, a brass foundry, a wheel foundry, and passenger and freight stations.

Since the year 1939, Respondent, Roque Aranda, has been employed by Petitioner as a wheel molder in its wheel foundry in Sacramento, California (Tr. 352). As such molder, he assisted in the remolding of cast iron wheels. These wheels are remolded from old wheels removed from freight cars operating in interstate commerce. The old wheels which provide the metal for the wheel foundry at Sacramento may come from anywhere on Petitioner's lines, which lines extend from Sacramento, California, north to Portland, Ore-

gon, northeast to Ogden, Utah, southeast to El Paso, Texas, south to the Mexican border, and west to San Francisco, California (Tr. 333). Thus, for example, when a wheel is worn out in Portland, Oregon, Ogden, Utah, or El Paso, Texas, it is shipped by one of Petitioner's interstate trains to the Sacramento foundry for "repair", the "repair" process being one of remolding the wheel (Tr. 333, 348).

The old wheels removed from freight cars (because they are no longer serviceable) are delivered to the foundry by means of flat cars upon which they have been loaded. The flat cars come to the Sacramento wheel foundry from various sources both within and from outside the State of California. When the wheels have been remolded at Sacramento, California, some of them are sent on flat cars directly to Ogden, Utah, and Portland, Oregon, where axles are affixed to the wheels (Tr. 330). Others are hauled by means of a straddle truck to the stores department of Petitioner to be stored for use as the need arises. Petitioner maintains a spur track directly connecting its foundry with its main track leading to Portland, Oregon, and other similar centers (Tr. 330).

Upon completion of the assembly of the axle unit in Portland or Ogden the wheel and axle are returned by the interstate railroad of Petitioner to its Sacramento, California repair shop. Here it is fitted upon trains as needed, some going on entirely new cars being assembled in Sacramento by Petitioner, and others being placed upon old cars as repairs. The repaired cars go wherever the need arises, be it Roseville, California, or El Paso, Texas, and or points in between (Tr. 331).

The Petitioner and the industry in general knows of no feasible way of repairing used or worn cast iron wheels except to remold them. Petitioner conducts its remolding

process at its Sacramento, California, wheel foundry where approximately 84% of all wheels used on its freight trains are remolded from old wheels (Tr. 333).

On the 12th day of June, 1950, Respondent was severely burned by molten metal while preparing to pour it into a mold at Petitioner's Sacramento wheel foundry.

ARGUMENT

The Federal Employers' Liability Act (45 USC 51) Applies to an Employee of an Interstate Common Carrier by Rail Injured While Remolding Train Wheels Which Have Been Worn Out in Use on Interstate Trains.

The pertinent section of the Act as amended in 1939, applicable in this case reads as follows:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way, directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act." 53 Stat. 1404, 1939.

Thus, it appears that an employee may invoke the act if any part of his duties (1) further interstate or foreign commerce (2) or directly or closely and substantially affect such commerce.

Prior to the 1939 Amendment, the Federal Employers' Liability Act covered only those employees of a carrier who, at the moment of their injury, were engaged in interstate commerce or work so closely related thereto as to be practically a part of such commerce. See 10 ALR 1184 and cases cited. This led to much confusion as to when an employee was and when he was not in interstate commerce. Thus, Congress amended the Act in 1939 to end

the confusion resulting from the efforts of courts to apply the strict "moment of injury" test to every case. 10 ALR 2d 1282-1283; *Edwards v. Baltimore & Ohio R. Co.*, 131 F.2d 366; *McLeod v. Threlkeld*, 219 U.S. 491, 87 L.ed 1538, 63 S.Ct. 1248; *Southern Pac. Co. v. Ind. Acc. Com.*, 19 Cal. 2d 271.

The Act as amended in 1939 is now almost all inclusive, and fine distinctions are no longer necessary. Prior to the amendment, many cases turned upon some slight differentiation in duty or operation, more apparent, than real, with much hair splitting and little certainty. Thus, it was to avoid all this and to give a fixity of application that Congress amended this Act to include any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce. See *Wright v. New York Cent. R. Co.*, 263 App. Div. 461, 33 NYS 2d 531, cert. den., 317 U.S. 668. See also *Taylor v. Lumaghi Coal Co.*, 353 Mo. 1212, 181 S.W. 2d 536, for similar direct furtherance of interstate work concept.

In the principal case the Respondent's duties as a molder of wheels caused him to further interstate commerce. Practically every one of Petitioner's interstate freight trains run on wheels made in its Sacramento wheel foundry (Tr. 333) (proceedings pp. 16, 17). Thus, not only is interstate commerce furthered by the duties of Petitioner, it is made possible by such duties. As one learned Court profoundly observed, no train may run without wheels, even in interstate commerce. *Shelton v. Thomson*, 148 Fed. 2d 1. In the *Shelton* case, the Plaintiff was employed to operate a crane used in lifting train wheels in a repair shop. The Act was held to apply to him.

Surely, without the operations performed by Respondent and others in Petitioner's foundry at Sacramento, its repair

shop activities at Portland, Oregon, and other places would be paralyzed.

Petitioner attempts to make a distinction between "manufacturing" and "commerce". In arriving at a decision in the case at bar the Court need not draw any such line between that which is manufacturing and that which is commerce. The applicable law makes the Petitioner liable if (1) any part of Respondent's duties further interstate commerce, or (2) any part of his duties substantially or closely affect such commerce. Thus, if we assume, for purposes of argument only, that Respondent was on the date of the accident engaged in manufacturing or production, the Petitioner is liable just the same.

The Courts make no apparent effort to distinguish between manufacturing and commerce. Thus, a blacksmith's helper engaged in making new strap hangers to be used by Defendant interstate railroad as replacement parts for its trains has been held to be covered by the Act. *Trucco v. Erie R. Co.*, 45 A.2d 20, Cert. denied 328 U.S. 843. Also, an employee running a forging machine for manufacturing small new parts for trains withdrawn from interstate commerce also has been held to be protected by the Act. *Baird v. N. Y. Cent. R. Co.*, 86 N.E. 2d 567.

Petitioner seeks also to suggest that the Act has no application to "new" construction but from the foregoing paragraph it may be seen that if an employee making new strap hangers as replacement parts for interstate trains, and one who makes new parts on a forging machine are protected by the Act, there is no method of reasoning by which Petitioner may successfully exclude Respondent. Could it be that new strap hangers for trains further interstate commerce or more substantially affect such commerce than train wheels? Most trains could probably run in inter-

state commerce without strap hangers, but few if any, could run without wheels. Moreover, the true test of the applicability of the Act is its effect upon or furtherance of interstate commerce, and is unrelated to whether the particular employment involves new or old construction. *Agostino v. Penn. R. Co.*, 50 F. Supp. 726; *Mo. Pac. R. Co. v. Fisher*, 177 S.W. 2d 725; *St. Louis-S. F. Ry. v. Wacaster*, 199 S.W. 2d 948; *Wright v. N. Y. Cent. Ry. Co.*, 33 N. Y. Supp. 2d 531. In the *Wacaster* case and the *Agostino* case the employee was held to be within the coverage of the Act, even though in each he was engaged in new construction. The case of *Moser v. Union Pac. R. Co.*, 65 Idaho 479, 147 Pac. 2d 336, reaches a contrary result, but it is submitted that the theory of the *Moser* case is that the Act should be strictly applied, and is therefore in direct conflict with the authorities cited above. (For a case indicating a liberal interpretation of the Act, see *Erickson v. Southern Pac. Co.*, 39 Cal. 2d 374.

It should be borne in mind that all of Petitioner's activities are handled under one parental roof and it is not a corporation solely engaged in the remolding of car wheels. Here the whole chain of activity started with the taking off of the old car wheels, which were worn out, the transferring of those old car wheels into a furnace where they are melted down, the pouring of this new melted material into remolding units, the creation of the remolded car wheel, the affixing of the axles and the subsequent attaching of those axles and car wheels to freight cars operating in interstate commerce. Surely, this is to be treated as one single operation for all practical purposes and all under the general control of Petitioner in a manner obviously directly and substantially affecting interstate commerce.

Further, assuming without admitting the necessity for showing Petitioner's activity at the wheel foundry to be one of "repair" rather than "manufacturing" to being this case at bar within the terms of the Act, it seems to be self-evident that no wheel can be "manufactured" until some car needs "repair". The foregoing statement is extremely pertinent here in view of the fact that no molten material can exist without the prior existence of the worn out wheels. Without the first worn out wheel there can be no creation of the new molten material. The mere fact that many of the wheels are stockpiled for a period does not break the chain of causality between the creation of the remolded wheels and their running on interstate railroad tracks, since it is the need for "repairs" which furnishes the material for the start of the so-called "manufacture". The entire procedure of remolding looks forward to and is created for the purpose of repairing the freight cars which have wheels in need of repair.

The duty of Respondent is nothing more than to repair one of Petitioner's instrumentalities of interstate commerce, temporarily withdrawn from such commerce, so that it may be returned to the commerce from which it has been temporarily withdrawn. The only way to repair a worn cast iron freight train wheel is to melt it down and remold it. Petitioner's foundry is essentially a repair shop, and the cases quite uniformly hold that repair shop activities are covered by the Federal Employers' Liability Act, *Shelton, v. Thomson*, 148 Fed. 2d 1; *Zimmerman v. Scandrett*, 57 F. Supp. 799; *Mills v. Terminal R. Assn.*, 205 S.W. 2d 942; *Harris v. Mo. Pac. R. Co.*, 149 P.2d 343; *Davis v. Gulf M. & O. R. Co.*, 219 S.W. 322; 10 ALR 2d 1273; *Lewis v. Ind. Acc. Com.*, 49 Cal. 2d 284.

CONCLUSION

It is submitted that in both the *Moreno* case and the *Aranda* case what we have is really repair and maintenance activity. In one instance worn out train wheels were being repaired. In the other an existing method of switching and classifying railroad cars was being improved. The judgments should be affirmed.

Respectfully submitted,

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